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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

AWILDA APONTE ROQUE,
SECRETARY OF THE DEPARTMENT
OF EDUCATION OF THE
COMMONWEALTH OF PUERTO RICO,
Petitioner,

v.

IPCIA M. KERCADO-MELENDEZ,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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April 15, 1988

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QUESTIONS PRESENTED

1. Whether the *Younger-Huffman-Dayton* abstention doctrine requires the federal judiciary to abstain from hearing a Section 1983 action challenging a state administrative disciplinary proceeding under the Teachers Misconduct Act initiated by Puerto Rico's Secretary of Education against the federal plaintiff, even though the federal action only challenges the State's motivation in initiating the proceeding and not the constitutionality of the Act itself.

2. Whether under *Younger-Huffman* as extended by *Dayton*, an administrative proceeding initiated by the state is rendered remedial and not coercive because the federal plaintiff must take "affirmative steps" to trigger the administrative review-mechanism provided by statute.

PARTIES TO THE PROCEEDING BELOW

The respondent herein was the plaintiff before the District Court and the plaintiff-appellee before the Court of Appeals for the First Circuit. Respondent is the party in interest to the relief afforded below. Petitioner was the defendant before the District Court for the District of Puerto Rico and defendant-appellant before the Court of Appeals for the First Circuit.

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Petitioner,

v.

IPCIA M. KERCADO-MELENDEZ

Respondent.

PETITION FOR WRIT OF CERTIORARI

The petitioner Awilda Aponte Roque, Secretary of the Department of Public Instruction of the Commonwealth of Puerto Rico, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on September 27, 1987, as amended by order of November 18, 1987.

OPINION BELOW

The opinion of the Court of Appeals, as amended, is reported as *Kercado-Meléndez v. Aponte Roque*, 829 F.2d 255 (1st Cir. 1987), and appears as Appendix A hereto. The opinion of the District Court is reported

at 841 F.Supp. 1326 (D.C.P.R. 1986), and appears as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on September 27, 1987. A timely petition for rehearing en banc was denied on November 18, 1987, and this petition for certiorari was filed within the April 16, 1988 deadline allowed by this Court's Order Extending Time to File Petition for Certiorari of February 4, 1988. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner (hereinafter "the Secretary") is the Secretary of the Department of Public Instruction (DPI) of the Commonwealth of Puerto Rico. She was appointed to said position in January 1985 by the newly elected Governor Rafael Hernández Colón, after the Popular Democratic Party (PDP) deposed the New Progressive Party (NPP) in the election held on November 1984. At all relevant times, respondent (hereinafter "Kercado") was the school superintendent of the Dorado School district. She is a member of the NPP.

As the new head of the DPI, the Secretary initiated public policy changes in the Department that significantly altered the past practice of the previous NPP administration. These public policy changes were instrumented through directives from the Secretary, be them circular letters or memoranda, addressed to the

pertinent DIP officials.[1] As school superintendent of the Dorado school district, Kercado is obliged by law to follow the directives of the Secretary.[2] The genesis of this case is predicated on an administrative complaint issued by the Secretary against Kercado, due to her failure to follow the Secretary's directives.

On May 20, 1985, the Secretary issued a memorandum entitled "Teaching Personnel Outside of their Regular Function", ordering all school superintendents to assign all teaching personnel in administrative functions to teaching positions at schools. Kercado failed to obey this directive by keeping teaching personnel in administrative functions in her office.

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[1] In Puerto Rico, contrary to the continental United States, all of the primary functions of the state have been entrusted to the state government by the Constitution of Puerto Rico. *See*, P.R. Const. Art. IV; P.R. Laws Ann. tit. 3, §§ 1-1567 (1982). The Secretary of the DPI is constitutionally and statutorily assigned the function of administrating all public education for the island of Puerto Rico. P.R. Const. Art. IV, § 6; P.R. Laws Ann. tit. 3, § 141 (1982). The educational system is divided into 100 school districts, roughly equivalent to a political municipality, except in the cities, which usually consist of various school districts. Each school district is run by a school superintendent, normally a tenured teacher who can only be removed for cause, pursuant to P.R. Laws Ann. tit. 18, §§ 274-274o (1974). The school districts, in turn, fall under one of eight administrative regions, each headed by a regional director. The regional director is the direct supervisor of each of the school superintendents in his region.

[2] P.R. Laws Ann. tit. 3, § 142 (1982) provides: "The Secretary of Education . . . shall appoint, as occasion may require, an officer for each school district to be known as the Supervisor of Schools, and these supervisors of schools shall in all respect be subject to the orders of the Secretary of Education." The terms school supervisor and school superintendent are interchangeable.

On July 10, 1985, the Secretary issued a circular letter which established the procedure for selecting teacher assistants. It provided that in the absence of consensus at the district level, the DPI regional director shall determine the personnel to be appointed. Kercado refused to follow the regional director's decision with respect to the appointment of fourteen (14) teacher assistants.

On December 9, 1985, the Secretary served on respondent a complaint pursuant to the Teachers Misconduct Act, charging her with insubordination consisting in failure to follow the directives and other acts of obstruction.[3]

A. THE TEACHERS MISCONDUCT ACT.

Through Law No. 115, of June 30, 1965, the legislature of the Commonwealth of Puerto Rico enacted legislation providing for the removal for cause of the DPI's tenured teachers. P.R. Laws Ann. tit. 18, §§ 274-274o (1974).[4] The Act enumerates the causes that warrant the cancellation of a teaching certificate and separation from teaching service. These causes include insubordination, negligence in the discharge of duties and conduct prejudicial to the good name of the Puerto Rico public education system. P.R. Laws Ann. tit. 18, § 274.

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[3] In addition to violating the directives previously discussed, the complaint charged Kercado with altering the functions and impeding the normal functioning of the Dorado assistant school superintendent. See Appendix D.

[4] See Appendix F for the text of the statute. For want of a better name, the district court designated the statute as the Teachers Misconduct Act. Appendix B, p. 29a. For purposes of this petition, said appellation is adopted.

The Act provides that if the Secretary, upon investigation, is satisfied that a teacher has incurred in any of the causes warranting disciplinary action, she "shall serve on the teacher an order of suspension or cancellation of certificate jointly with a complaint specifying the charges which are ground for such an action." P.R. Laws Ann. tit. 18, § 274a. The order shall notify the affected teacher of her right to appeal to the DPI Board of Appeals, within 10 days of notification. *Id.* If not appealed within 10 days, the order shall become the suspension or cancellation order of the Secretary, and shall be final and conclusive. P.R. Laws Ann. tit. 18, § 274b.

If, however, the complaint is appealed to the Board of Appeals, the writ of appeal "shall stay the effects of the order of cancellation or suspension of certificate." P.R. Laws Ann. tit 18, §274d.[5] In such cases, the Secretary may, pending the appeal, suspend the teacher from office and salary, but only for a period of 90 days, unless a maximum extension of 90 days is approved by the Board of Appeals. *Id.* In cases of Board approved extension, however, the teacher resumes drawing her salary. P.R. Laws Ann. tit. 18, § 274n. If the Board of Appeals has not decided within 180 days, the aggrieved teacher shall be reinstated in her position, pending a final decision by the Board.

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[5] In its opinion, the Court of Appeals stated that the appeal of the order to the Board would "stay the effects of the cancellation order, substituting in its stead a suspension of Kercado's employment and salary pending the outcome of her appeal." 829 F.2d at 257. This is incorrect. Pursuant to the statute, while the stay is automatic, the suspension is discretionary.

The DPI Board of Appeals is an independent, separate entity required and empowered to give a full evidentiary hearing.[6] The Board's "decision may affirm, revoke or modify the order of the Secretary." P.R. Laws Ann. tit. 18, § 274i. The Act provides for a speedy review process by the Board. P.R. Laws Ann. tit. 18, §§ 274f, 274i. A party adversely affected by the Board's decision has 30 days to seek judicial review before the Superior Court of Puerto Rico, which shall apply the rules for review of administrative bodies. P.R. Laws Ann. tit. 18, § 274e.

B. DISTRICT COURT PROCEEDINGS

Instead of filing an administrative appeal, Kercado amended her original complaint and sought injunctive relief and damages under 42 U.S.C. § 1983.[7] The

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[6] The Board is comprised of three persons appointed by the Governor with the advice and consent of the Senate for a term of four years. Its presiding officer must be a lawyer or bachelor of law. Its members serve without pay and cannot be employees of the public education system. The Board must, at the parties' request, compel the appearance of witnesses and the production of documents; a refusal to obey can be met by a court order subject to contempt. P.R. Laws Ann. tit. 18, § 274e. The hearing itself must be public before at least two members and concurred in by at least two. P.R. Laws Ann. tit. 18, § 274g. Both sides can present evidence and have a right to counsel, to cross-examination of witnesses, and to being supplied beforehand with the names and addresses of the opposition's witnesses and copies of their statements. P.R. Laws Ann. tit. 18, § 274h.

[7] The original administrative complaint against respondent issued on October 28, 1985. Respondent sought review of the charges before the DPI Board of Appeals. Subsequently, however, respondent filed a section 1983 complaint in the federal district court and withdrew her petition for review before the Board of Appeals. Her federal action sought a Temporary Re-

Secretary requested the district court to abstain from entertaining Kercado's action for injunctive relief, claiming that by not availing herself of the administrative-judicial review of the charges provided by the Act, Kercado was collaterally seeking to annul a state proceeding initiated to vindicate the interests embodied in the Teachers Misconduct Act. The district court rejected the Secretary's contention, holding that there was no administrative hearing pending at the time of litigation and that *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 499 (1982), does not require exhaustion of administrative and state remedies. The court, after a bench trial, found that the charges, even if facially valid, had been instituted against respondent because of her political affiliation and did not warrant her discharge. Accordingly, the district court ordered the Secretary to reinstate Kercado as school superintendent, and ordered back pay, $15,000 in actual damages and $10,000 in punitive damages.

C. THE COURT OF APPEALS DECISION

The Court of Appeals, in a 2 to 1 decision, affirmed the district court's grant of reinstatement, backpay and damages. In particular, a majority of the panel

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straining Order seeking to enjoin her removal on the basis of petitioner's failure to provide a pretermination hearing required by *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). As a result, the Secretary withdrew the initial complaint, afforded respondent a pretermination hearing in accordance with *Loudermill*, and on December 9, 1985, issued another administrative complaint, essentially containing the same charges as the October 28, 1985 complaint. On January 15, 1986, respondent amended her federal complaint, which remained only as to damages, to include a new cause of action in order to seek injunctive relief and damages under Section 1983. It is the injunctive relief therein requested, from which the Secretary seeks relief.

rejected the Secretary's argument that the district court should have abstained. The court recognizes the applicability of *Younger* abstention to state administrative proceedings, but found abstention inappropriate because: (a) the federal action did not challenge directly the constitutionality of the Teachers Misconduct Act; (b) the available administrative appeal was remedial rather than coercive; and (c) *Patsy* does not require exhaustion of the integrated administrative-judicial review mechanism provided by the Act.

REASONS FOR GRANTING THE WRIT

The Court of Appeals decision raises important constitutional questions because it misconstrues Supreme Court precedent and overlooks the overriding concerns of federalism, comity and equity that control whenever the state initiates an administrative proceeding to vindicate important state interests embodied in the state law. The exercise of jurisdiction in this case is particularly intrusive given that the statute involved expressly provides for an integrated administrative-judicial review mechanism geared to insure to the affected party a full, fair and speedy consideration of the charges issued against her. In effect, the Court of Appeals' decision marks a substantial transfer of public personnel administration from the state to the federal courts, and eviscerates the state's interest in the enforcement of statutes aimed at maintaining the integrity and responsiveness of the state's educational systems. This result is hostile to the common underlying purpose of all abstention doctrines: to ensure the proper relationship between the states and the federal judiciary.

In extending abstention doctrine from a state criminal proceedings to civil proceedings and finally to

state administrative proceedings, the Court has required the presence of two factors in order to insure consonance between legitimate state and federal interests; these are:

(a) That the state civil or administrative proceeding be initiated to vindicate an important state interest.

(b) That the state proceeding afford the federal plaintiff an opportunity to hear her constitutional claims.

Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619, 106 S.Ct. 2718, 2723 (1986); *See Younger v. Harris*, 401 U.S. 37 (1971); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Huffman v. Pursue*, 420 U.S. 592 (1975); *Juidice v. Vail*, 430 U.S. 327 (1977); *Trainor v. Hernández*, 431 U.S. 434 (1977); *Moore v. Sims*, 442 U.S. 413 (1979); *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982); *Pennzoil v. Texaco*, ___ U.S. ___ , 107 S.Ct. 1519 (1987).

It is undisputed that both these factors are present in this case. Certainly, enforcement of the Teachers Misconduct Act which is the only disciplinary mechanism for removing a tenured teacher for cause, embodies an important state interest in the integrity of the Commonwealth's educational system. *Williams v. Red Bank Board of Education*, 662 F.2d 1008, 1019 (3d. Cir. 1983). Similarly, it is clear that the administrative mechanism provided by statute allows plaintiff to raise her constitutional claims, since the DPI's statute itself proscribes discrimination on the basis of political affiliation and the appeals board is empowered to hear the constitutional claims. Thus,

P.R. Laws Ann. tit. 18, § 249e (1974) expressly prohibits the school authorities from discriminating against a teacher because of her political affiliation. See Appendix E. In *Vélez Ramirez v. Romero Barceló*, 112 P.R. Dec. 716, 728 (1982), the Commonwealth Supreme Court makes clear that an administrative body charged pursuant to statute with hearing the just cause removal charges against a public official is empowered to hear all constitutional claims, including those of unconstitutional motive. See Appendix C.

I. The Court of Appeals' determination that abstention is inappropriate because the federal action challenges the motivation of the Secretary, but not the constitutionality of the state proceeding, misconstrues Supreme Court authority and conflicts with other court of appeals.

In its decision, nonetheless, the Court of Appeals determined that abstention was inappropriate because the relief sought by the federal plaintiff was not "seeking to mount a broad, constitutional attack on the legitimacy of the state proceeding or their underlying statutory predicate." 829 F.2d at 261. According to the court, abstention is appropriate only if "the state proceeding is itself the wrong which the federal plaintiff seeks to correct via injunctive relief under section 1983." 829 F.2d at 260. Abstention, however, is unsuitable whenever "a teacher alleges that her dismissal was motivated by an unconstitutional purpose." 829 F.2d at 261.

The Court of Appeals' decision renders *Younger* abstention inapplicable whenever a federal section 1983 action challenging the enforcement of a state law *alleges* an unconstitutional motive, such as political, religious or racial discrimination proscribed by the first

amendment or the equal protection clause of the fourteenth amendment. Such an exegesis of abstention doctrine constitutes an alarming misreading of this Court's authority because it overlooks the overriding substantive interest of the state in the enforcement of its laws, and because it redefines the bad faith exception to *Younger* abstention in a manner contrary to this Court's pronouncements and inimical to the values of federalism and comity informing its application.

There is no Supreme Court authority indicating that a broad constitutional attack on the state proceeding or its underlying statutory predicate is a *sine qua non* of *Younger* abstention. On the contrary, the focus of this Court's precedent, as well as that of other appellate circuits, has been on the impairment that federal intervention imposes on the substantive interest of the state as a sovereign. Thus, this Court's attention has been on whether the state interest in the underlying proceeding "goes beyond its interest as adjudicator of wholly private disputes." *Pennzoil*, 107 S.Ct. at 1527, n. 2. *See Trainor*, 431 U.S. at 444.

The Court of Appeals' discernment that the "state interest at stake was severely diminished," 829 F.2d at 261, because the federal action attacked the unconstitutional motivation of the state official enforcing the Act and not the constitutionality of the Act itself, miscalculates the substantive interest of the Commonwealth in the enforcement of the Teachers Misconduct Act. The Commonwealth shares as important an interest in the enforcement of state law as in the constitutional pristineness of the Act. The attack on the state enforcement proceedings, due to an alleged unconstitutional motive, do not any more "automat-

ically vitiate the adequacy of those proceedings for purposes of *Younger-Huffman* line of cases," *Moore*, 442 U.S. at 427, n. 10, than do attacks on the constitutionality of the underlying statute. Furthermore, it is clear that abstention concerns cloak "those in charge of an executive branch of an agency or local government". *Rizzo v. Goode*, 423 U.S. 362, 380 (1976). Thus, contrary to the Court of Appeals' assertion, abstention concerns are most implicated where the federal action seeks to enjoin "state officials from enforcing state statutes or implementing public policies." *Trainor*, 431 U.S. at 444, n.8.

In the case at bar, it is the enforcement of the Teachers Misconduct Act by the Secretary as a representative of the state in its sovereign capacity which comprises the nucleus of both the state administrative proceeding and the federal action. It is the action initiated by the Secretary which the federal plaintiff seeks to annul. The Court of Appeals distinction between a federal action premised on an unconstitutional motivation as opposed to an unconstitutional statute misapprehends the identical interest impaired by federal intervention: in both circumstances, interference with the state proceeding "prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies." *Huffman*, 420 U.S. 604.

The First Circuit's decision with respect to this matter conflicts with the Third Circuit and the Ninth Circuit. *Williams v. Red Bank Board of Education*, 662 F.2d 1008 (3rd Cir. 1981), a case on point, concerns a federal action to enjoin tenure termination

proceedings initiated by a New Jersey school board against a federal plaintiff. There, the plaintiff contended that the state's interest in the prosecution of tenure charges against her was not implicated where her federal injunctive request attacked the manner in which the tenure system was being applied to her, rather than attacking the system as facially invalid. The Third Circuit rejected this argument, holding that "an injunction by a federal court commanding state and local officials to cease action on a tenure charge against a public school teacher cannot have other than a disruptive impact on the state's ability to ensure a competent and qualified body of teachers". 662 F.2d at 1018, n.10.

The Ninth Circuit seems to have reached similar determination in *Fresh International Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353 (9th Cir, 1986). Said case involved a preemption challenge to state officials' enforcement of the California Agricultural Labor Relations Act. There the Ninth Circuit noted:

> Of course, *Younger* is not necessarily inapplicable because a state's processes are not being challenged. Rather, when a plaintiff does not challenge state proceeding, the focus shift to an examination of the state's interest in the law sought to be enforced. *Dayton* makes this obvious.

805 F.2d at 1360, n.9.

In addition to its erroneous calibration of the state interest involved whenever a federal plaintiff claims that a state official is enforcing a state law due to an unconstitutional motive, the First Circuit's focus

on said motive errs in another fundamental manner: namely, it unbridles the bad faith exception to *Younger* abstention of all its equitable restraints. While the Court of Appeal does not recognize it as such, its vision of an alleged unconstitutional motive as the trigger for federal equitable intervention is tantamount to the bad faith exception to abstention recognized by this Court in the *Younger-Huffman* line of cases. There, this Court left room for federal intervention with state initiated proceedings where there is a showing that the state proceeding "is motivated by a desire to harass or is conducted in bad faith," *Huffman*, 420 U.S. at 611, or where there are other "extraordinary circumstances in which the necessary irreparable injury can be shown." *Younger*, 401 U.S. at 53. The Court of Appeal's pronouncement that "a teacher who alleges that her dismissal was motivated by an unconstitutional purpose need not pursue her administrative remedies," 829 F.2d at 261, is essentially indistinguishable from the bad faith exception described by this Court.

This disguised exercise of the bad faith exception by the First Circuit is contrary to the criteria established for its application by this Court. For this Court has indicated that bad faith exception is to be invoked only in extraordinary circumstances where it can be objectively shown that the state officials have harassed the federal plaintiff with multiple unsuccessful prosecutions or threats of prosecution without hope of a conviction, and where the state proceeding provides no adequate mechanism for resolution of the constitutional issues. *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Cameron v. Johnson*, 390 U.S. 611 (1968); *Pérez v. Ledesma*, 401 U.S. 822 (1975); *Younger*, 401 U.S.

at 48-50. For it is clear that the "cost, anxiety, and inconvenience of having to defend against a single criminal prosecution" is not the type of injury that warrants federal interference. *Younger*, 401 U.S. at 46.

Dombrowski exemplifies the extraordinary circumstances calling for the application of the bad faith exception. There, plaintiffs brought a section 1983 action against Louisiana's law enforcement officials alleging that their prosecution under the state's law was part of a plan of persecution and harassment because of their civil rights activities on behalf of blacks. The Court found bad faith where the state officials had brought an unsuccessful prosecution and threatened further prosecutions, and there was no prospect that the state proceedings would "provide satisfactory resolution of constitutional issues." *Dombrowski*, 380 U.S. at 487. Similarly, in *Pérez v. Ledesma*, 401 U.S. 82, 91 (1975), this Court explained: "only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown" will federal intervention be appropriate.

This case evidences no facts or other extraordinary circumstances warranting application of the bad faith doctrine.[8] While the complaint alleges bad faith, nei-

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[8] It should be noted that in the Court of Appeals' original opinion of September 27, 1987, the court found, in the alternative, that abstention would have been improper because "Kercado's complaint alleged facts sufficient to support the application of the bad faith exception to the *Younger* doctrine." Appendix

ther it nor the district court proceeding demonstrate a scheme of harassment evidenced by multiple charges or proceedings initiated by the Secretary against Kercado without hope of prevailing on the merits. On the contrary, the district court's opinion acknowledges that the conduct attributed to Kercado in the complaint did occur, but that it did not warrant or required the cancellation of her teacher certificates. Furthermore, there is no indication that the Board of Appeals proceeding would have been institutionally biased or otherwise incapable of addressing Kercado's constitutional claim thereby creating a situation of immediate irreparable harm calling for federal intervention. *Cf. Gibson v. Berryhill*, 411 U.S. 564 (1973); *Kugler v. Helfant*, 421 U.S. 117, 124-125 (1975).

In essence, by holding that an allegation of unconstitutional motive dispenses the federal judiciary from compliance with *Younger* abstention, the Court of Appeals introduces through the back door the bad faith exception, but divested of the requirements enunciated by this Court for its application. By reducing the bad faith exception to mere talismanic allegations of unconstitutional motive in the complaint, the court transmutes the exception into the rule. This facile application of the exception defeats the fun-

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G, p. 123a. Revealingly, the Court equated bad faith with respondent's allegation that the state proceedings "was motivated by the Secretary's dissatisfaction for her political affiliation." Pursuant to the Secretary's "Petition for Rehearing," on November 18, 1987 the court issued two orders, one denying the petition for a rehearing en banc, and the other deleting footnote No. 5. Appendix H. By focusing, however, on the unconstitutional motive factor the Court of Appeals continues to apply, under a different legal nomenclature, the bad faith exception in a manner contrary to *Younger* abstention doctrine.

damental values of federalism, comity and equity informing *Younger* abstention and converts the federal courts, via the federal action, into super-personnel boards sitting in the place and substituting the judgment of the administrative-judicial bodies established by the state for this purpose.[9] A result more offensive to the "proper respect for state functions" contemplated by "Our Federalism", *Younger*, 401 U.S. at 44, is difficult to envision.

II. The Court of Appeals' determination that abstention is inappropriate because the state administrative proceeding was remedial and the federal plaintiff did not have to exhaust the integrated administrative judicial review mechanism provided by statute is contrary to Dayton Christian Schools and in conflict with other court of appeals.

The Court of Appeals held abstention inappropriate because it found that the administrative proceeding was not ongoing since it was remedial, rather than coercive. *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 106 S.Ct. 2718, 2723, n.2, (1986). The majority opinion concluded that the "appeal" was remedial and controlled by *Patsy* be-

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[9] The instant case is symptomatic of the super-personnel board role to be played by the district courts under these circumstances. At trial, the district court examined the charges contained in the complaint issued by the Secretary against Kercado, reviewed the evidence and testimony in support of such charges, and appraised that under its assessment of *state* law, and conceding the facial validity of the charges, they did not warrant Kercado's discharge. The assessment under the state law as to the merit of the charges, and the district court's substitution of its judgment for that statutorily entrusted to the Board of Appeals, is precisely the type of interference with and usurpation of state functions that *Younger* abstention seeks to avoid.

cause "the dismissed teacher *must take affirmative steps* to initiate the appeal to the Board of Appeals", and because Kercado *"cannot be coerced into appearing before the Board of Appeals*, but is provided with an administrative remedy should she choose to avail herself of it." (emphasis ours) 829 F.2d at 261. The majority opinion also held that the proceeding was remedial (i.e., there existed no pending state proceeding) because "the issuance of the dismissal 'order', based on an unconstitutional motive, constituted the legal wrong suffered by Kercado", while the appeal to the Board was a remedy "available to her". *Id.*

Said analysis is erroneous. First, as the dissent accurately points out, the panel misreads Commonwealth law when it characterizes the "appeal" mechanism of the Teacher's Misconduct Act as providing for a remedy distinct from the legal wrong. Section 274b provides that "if not appealed within the term of ten (10) days, the order shall become the suspension or cancellation order of the Secretary and it shall be final and conclusive." P.R. Laws Ann. tit. 18, § 274b. Section 274d provides that "[t]he filing of the writ of appeal . . . shall stay the effects of the order of cancellation or suspension of the certificate." P.R. Laws Ann. tit. 18, § 274d It is obvious that, under Commonwealth law, there are orders and there are orders. The "order" that accompanies the charges (the original "order"), can be automatically stayed by the affected teacher by the mere filing of an appeal. In such case, the proceedings -including a full blown hearing- are conducted before the Board of Appeals. The "order" becomes really an "order of the Secretary", only "if not appealed", or when the Board

makes a final determination. P.R. Laws Ann. tit. 18, § 274b. This is no different from any contested case where the defendant must answer the charges either accepting or denying them; and only upon defendant's denial of the charges are the full blown proceedings triggered. The only peculiarity of Puerto Rico's statutory scheme is that the manner in which the teacher contests the charges is by filing an "appeal" instead of an answer. The majority of the panel, therefore, can conclude as it did, only by looking at the words "order" and "appeal" divorced from the real substance of the proceedings. That is why Judge Breyer's dissent astonishingly notes:

> How can the majority find the plaintiff was not in the midst of this procedure when she brought her federal law suit? The majority seems to do so only by artificially separating the statute's "sending-the-other" provision from the rest of the statute. The majority reads the "sending-of-the-order" provision as if it permitted the Commonwealth to dismiss a teacher without a full-blown hearing simply by sending the piece of paper called an "order", as if the sending of that piece of paper constituted the legal wrong and all the rest provided by the statute were but a state remedy. In any contested case, however, the sending of the "order" and the hearing on "appeal" are steps within an integrated, statutory administrative scheme—a scheme similar to those often used by states to dismiss tenured teacher. Unless one viewed Puerto Rico's law as embodying an effort to dismiss tenured teachers without hearing (which nei-

> ther the statutory language nor common sense suggested is so) this case fits squarely within the *Younger* doctrine . . . For these reasons, it seems to me that the majority's view both misreads Puerto Rico's law and, in any event, runs contrary to relevant Supreme Court authority.

829 F.2d at 267 (Breyer, J; dissenting).

Secondly, the holding that the administrative proceeding in this case is remedial rather than coercive simply because the dismissed teacher must take "affirmative steps" to invoke said proceeding and therefore, "cannot be coerced into appearing before the Board," is clearly contrary to established *Younger* abstention doctrine. The critical distinction between "coercive" and "remedial" does not depend on whether affirmative steps must be taken. A proceeding is coercive if the state has initiated it against an unwilling defendant exposed to the loss of a liberty or property right for violation of a state statute. In any such proceeding the defendant must act, he must defend himself; but the fact that he must act or take "affirmative steps" does not render the proceedings remedial. Nor the fact that the defendant may if he wishes, waive his rights, change the coercive nature of the proceedings. Thus, in the same way as Kercado cannot be "coerced into appearing before the Board", a defendant cannot be coerced into answering the charges in a complaint, or into appearing at a hearing scheduled to hear the charges. In other words, the defendant can never be coerced into defending himself, but the fact that he has such a choice certainly does not render the proceeding remedial.

Kercado in this case is in the same shoes as the federal plaintiff in *Juidice*, who chose not to appear at the contempt hearing; in *Middlesex County*, who decided not to answer the disciplinary charges issued against him; in *Dayton*, who sought to bail out of the administrative proceeding; and in *Huffman*, who opted not to utilize the state appellate remedies. All these plaintiffs share in common the natural consequences of jettisoning state proceeding: they voluntarily forfeit the opportunity of contesting the charges and become bounded by the determination issued against them. Under these circumstances, *Younger* impedes that they recur to the federal forum to collaterally challenge the state determination.

Third, even if the "appeal" to the Board of Appeals is really an appeal, it is a review mechanism within a highly integrated administrative proceeding which also provides for judicial review in the Commonwealth courts. This Court has held that in such cases the failure of a federal plaintiff to avail himself of an opportunity for review forecloses the door to the federal courthouse. In *Huffman*, a judgment and permanent injunction issued by an inferior state court had become final and unappealable and, therefore, the plaintiff sought federal intervention contending there was no longer a pending state court proceeding. This Court rejected this contention, noting that federal intervention prior to the exhaustion of appellate remedies impaired the same concerns that *Younger* sought to protect. The Court held, therefore, that a "necessary concomitant of *Younger*" is the need to exhaust state appellate procedures before seeking federal injunctive relief. 420 U.S. at 608.

Huffman clearly indicates that once the state initiates the administrative proceeding to vindicate important state interests and it affords the federal plaintiff an opportunity to raise his constitutional claims, said proceeding is "pending" regardless of whether the plaintiff utilizes or not the opportunity to appeal charges or the adverse determination. Thus, *Huffman* held that the term "pending proceeding" serves only to "distinguish state proceedings which have already commenced from those which are merely incipient or threatened". 420 U.S. at 607.

The panel majority attempted to distinguish *Huffman* by pointing out that the exhaustion requirement to *Younger* cases had been restricted by *Wooley v. Maynard*, 430 U.S. 705, 710-11 (1977), to cases in which the federal plaintiff attempts to use the federal courts "to annul the results of a state trial." The panel majority then concluded that in this case Kercado had "made no such effort." 829 F. 2d at 262. In *Wooley*, however, *Huffman* was held inapposite because the federal plaintiff sought only to preclude further prosecution. The federal plaintiff therein had already sustained convictions and served a sentence of imprisonment for his prior offenses. He did not seek "to have his record expunged or to annul any collateral effects" of those convictions. 430 U.S. at 711. He sought "only to be free from prosecutions for future violations of the same statutes." *Id.* Thus, *Wooley* is nothing but a restatement of a basic element of the Younger doctrine which requires a prosecution or proceeding to have been initiated prior to the commencement of the federal action. *Steffel v. Thompson*, 415 U.S. 452 (1974).

In this case, contrary to *Wooley*, Kercado's only concern is with the proceeding initiated by the Commonwealth pursuant to the Teachers Misconduct Act. She is not seeking to enjoin future charges under such Act but using the federal courts to annul the proceedings brought against her by the Secretary. She is akin to the federal plaintiff in *Huffman* who sought "federal post-trial intervention, in a fashion designed to annul the results" of the state proceeding. *Huffman*, 420 U.S. at 609. The instant case fits squarely within the import of *Huffman* and has no relation whatsoever with Wooley.

The Secretary submits that the only definition of "coerciveness" consistent with prior Supreme Court authority is that of "coerciveness" understood as state proceeding initiated against an unwilling defendant exposed to the loss of a property or liberty right. This definition is congruent with the distinction between a *Younger* and *Patsy*-like situation described in *Huffman*, where this Court held that Section 1983 action alleging deprivation of federal rights "had nothing to do" with the "deference to be accorded state proceedings which have already been initiated and which afford a competent tribunal for the resolution of federal issues." 420 U.S., at 609, n. 21. The critical distinction between *Younger* abstention and *Patsy* is that *Patsy* does not involve a state initiated proceeding to vindicate a substantive interest of the state. In *Patsy* an applicant for employment was rejected because of her race and sex. There was no state proceeding initiated to vindicate state law. The failure to hire in *Patsy* clearly was not effectuated to advance a substantive state interest, and the state did not act in its sovereign capacity. Thus, in *Patsy*

none of the abstention concerns are present and there is no justification for the federal courts to stay their hand. The situation is quite different in this case where the Commonwealth has initiated a disciplinary proceeding to protect the integrity of its educational system. *Patsy* is clearly inapplicable.[10]

To conclude, the First Circuit has failed to apply the clear principles of the *Younger-Huffman-Dayton* abstention doctrine. The "affirmative step" and "coerced into appearing" criteria for determining the coercive or remedial nature of the proceedings is clearly contrary to *Younger* and its progeny. Said criteria eviscerates the letter and the spirit of this Court's abstention doctrine in cases in which the state has initiated a proceeding to vindicate an important state interest.

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[10] The Fifth Circuit in *Thomas v. Texas State Board of Examiners*, 809 F.2d 453 (5th. Cir. 1987) seemingly coincides with the First Circuit in holding that the mere availability of state judicial review of state administrative proceedings does not amount to the pendency of state proceedings for purposes of *Younger* abstention. 807 F.2d at 456. On the other hand, albeit without much analysis, the Eight Circuit has indicated in *Peery v. Brakke*, 826 F.2d 740 (8th Cir. 1987), that *Dayton Christian Schools* signals a "clear break" with past law enunciated in *Patsy*, but refused to apply it retroactively. 826 F.2d at 745. Similarly, in *Ronwin v. Dunham*, 818 F.2d 675 (8th Cir. 1987), the Eight Circuit indicated that abstention is appropriate and *Dayton Christian Schools* does not conflict with *Patsy*, so long as the federal plaintiff is in a state proceeding initiated to vindicate an important state interest and which provides an adequate opportunity to raise constitutional claims. 818 F.2d at 677, n.7.

III. The First Circuit panel opinion can profoundly alter the proper relationship between the states and the federal courts.

The First Circuit opinion in this case will have a profound impact on the relationship between the federal courts and the state's administration of its personnel policies. Although the present case relates to the Commonwealth's administration of its educational system, the impact of the First Circuit opinion is much broader. It affects any proceeding initiated by a state to discipline an employee for just cause. The employee will be able to jettison himself out of the state proceeding and into the federal court merely by alleging an unconstitutional motive in the institution of the charges, even where there is no suggestion that the state administrative-judicial mechanism cannot fairly adjudicate the employee's constitutional claims. Thus, the federal courts will be converted into super-personnel boards in charge of adjudicating disciplinary proceedings against state employees for just cause.

In sum, it seems evident that the First Circuit's decision impoverishing the *Younger* abstention doctrine raises an important constitutional question with respect to the application of this Courts' decision in *Dayton Christian School*. This is a vital issue with grave consequences to the integrity and independence of functions that are properly left to the states to perform. The existing conflict of circuits highlights the need for this Court to presently address and clarify the questions presented.

CONCLUSION

In light of the foregoing discussion, the Secretary respectfully requests that this Court issue the Writ

of Certiorari in order to clarify the important questions presented for review.

In San Juan, Puerto Rico, this April 15, 1988.

Respectfully submitted,

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APPENDIX

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APPENDIX B — *Ipcia M. Kercado-Melendez v. Aponte Roque*, Civil No. 85-2261, Slip op. (D.C. PR. August 12, 1986) 28a

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APPENDIX A

UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT.

IPCIA M. KERCADO-MELENDEX,
Plaintiff, Appellee,

v.

AWILDA APONTE-ROQUE, etc.,
Defendant, Appellant.

No. 86-1853

Heard May 7, 1987,

Decided Sept. 22, 1987.

Puerto Rican school superintendent brought § 1983 action alleging she was fired from her position because of her political affiliation. The United States District Court for the District of Puerto Rico, 641 F.Supp. 1326, Hector M. Laffitte, J., entered judgment for school superintendent and appeal was taken. The Court of Appeals, Bownes, Circuit Judge, held that: (1) availability of noncoercive administrative appeal by which school superintendent could have challenged her dismissal did not require district court to abstain from entertaining superintendent's § 1983 action; (2) failure of Secretary of Department of Instruction to give school superintendent notice of charges and opportunity to respond prior to dismissal violated due process rights of superintendent; and (3) school superintendent in Puerto Rico would not have been discharged but for her political affiliation, in violation of her First Amendment rights.

Affirmed and remanded.

Breyer, Circuit Judge, dissented and filed opinion.

Carlos Del Valle, with whom Hector Rivera Cruz, Secretary of Justice, Ramirez & Ramirez and Marcos A. Ra-

mirez Irrizarry, Hato Rey, P.R., were on brief, for defendant, appellant.

Hector Gonzalez Lopez, with whom Hector Urgell Cuebas and Pedro Miranda Corranda, San Juan, P.R., were on brief, for plaintiff, appellee.

Before BOWNES and BREYER, Circuit Judge, and CAFFREY,* Senior District Judge.

BOWNES, Circuit Judge.

Defendant-appellant Awilda Aponte-Roque, Secretary of the Department of Public Instruction (DPI) in Puerto Rico, appeals a judgment entered against her in a section 1983 suit brought by plaintiff-appellee Ipcia M. Kercado-Melendez. Kercado had alleged that she was fired from her position as superintendent of the Dorado School District because of her political affiliation with the Partido Nuevo Progresista (PNP). The United States District Court for the District of Puerto Rico, sitting without a jury, ordered Kercado reinstated to her former position, and awarded her over $37,000 in back pay and damages. This appeal by Aponte followed.

I. BACKGROUND

Ipcia Kercado worked for the Department of Public Instruction for eighteen years, rising through the ranks until she attained the position of superintendent for the Dorado School District. Kercado was well known in Dorado as a prominent member of the Partido Nuevo Progresista, which was deposed as Puerto Rico's ruling party by the Partido Popular Democratico (PPD) in the election of 1984. In January, 1985, Awilda Aponte-Roque, a PPD member, was appointed Secretary of the DPI.

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* Of the District of Massachusetts, sitting by designation.

On October 28, 1985, Kercado received a complaint[1] from the Secretary of Public Instruction cancelling her teaching certificate and dismissing her as superintendent of the Dorado School District. It charged Kercado with incompetence, negligence, insubordination, and improper conduct. Kercado was accused of keeping two teachers in administrative positions during the month of August, 1985, when they should have begun to resume their teaching duties. It was also alleged that she improperly impeded the Dorado district's assistant superintendent, Hector Lopez Maldonado, from performing his duties. In addition, Kercado was charged with failing to process fourteen teacher assistant appointments.

The complaint informed Kercado that Aponte, in her capacity as Secretary of the DPI, had decided to "permanently cancel your teacher certificate(s) which you hold in order to teach in the public and private schools of the Commonwealth of Puerto Rico and [to] dismiss you from your post." The cancellation order which became effective upon receipt by Kercado stated that, pursuant to Puerto Rico law, she had ten days to appeal the order to the Board of Appeals of the Public Education System. Such an appeal would stay the effect of the cancellation order, substituting in its stead a suspension of Kercado's employment and salary pending the outcome of her appeal. The order further stated that if Kercado did not appeal the cancellation within ten days, it would become "final and binding."

On November 5, 1985, Kercado filed an appeal with the Board of Appeals, which scheduled a hearing on the charges for November 27. On November 7, Kercado instituted an action in the United States District Court for the District of Puerto Rico, claiming that her dismissal was prompted by her affiliation with the PNP. Kercado also asserted that she had been denied due process, be-

[1] The document is a combined notice and order entitled "Complaint."

cause she had not been given an opportunity to respond to the charges against her prior to the Secretary's termination action. She sought either a temporary restraining order or a preliminary injunction. The following day, November 8, Kercado withdrew her appeal from the Board of Appeals.

After Kercado had filed her action in federal court, and withdrawn her administrative appeal, the Secretary invited her to appear at an informal hearing schedule for November 14, 1985. Kercado wrote a letter to the Secretary in which she declined the invitation to appear at the informal hearing. In the letter, she noted that a "show cause" hearing was scheduled in federal court on November 18, which would address the issue of whether the failure to grant her a hearing before the issuance of the cancellation order violated her due process rights. On November 18, the Secretary dismissed all charges against Kercado and reinstated her as superintendent of the Dorado School District.

One week later, the Secretary tried again to dismiss Kercado. On November 25, Kercado received a letter requesting her presence at an informal hearing on charges against her. The hearing took place the following day, November 26, before Elba Rodriguez Fuentes, Director of the Legal Division at the DPI. Kercado was read the charges against her and given the opportunity to respond. No evidence or witnesses were presented by either side at the hearing.

On December 9, Kercado was served with an order cancelling her superintendent's certificate and dismissing her from employment with the DPI. The December 9 order enumerated the same charges contained in the October 28 order, albeit in a more condensed form. The order notified Kercado of her right to file and administrative appeal, and informed her that a failure to file such an appeal within ten days would render the order "final and binding."

Kercado declined to file an administrative appeal; instead, she pressed her action in the federal court. She amended her original complaint and sought injunctive relief and damages under 41 U.S.C. § 1983. The district court agreed with Kercado that she had been dismissed from her position as superintendent because of her political affiliation with the PNP. The court found the charges brought by the Secretary against Kercado to be without merit. It noted further that, even accepting the facial validity of the Secretary's allegations, they were not serious enough "to warrant the *discharge* of an employee of plaintiff's caliber who had been with the DPI for eighteen years." (Emphasis in orignal.) The court also held that Kercado had been deprived of her due process rights when the Secretary dismissed her on October 28, 1985, without granting her a pretermination hearing. Accordingly, the district court ordered the Secretary to reinstate Kercado as superintendent of the Dorado School District, 641 F.Supp. 1326. Kercado was awarded $12,074.50 in back pay, $15,000 in actual damages and $10,000 in punitive damages.

II. THE ISSUES

There are four issues on appeal. First, the Secretary urges that the district court should have abstained from hearing the case because Kercado could have pressed her claims in the state administrative appeal that was available to her. The Secretary points out that, had Kercado been dissatisfied with the result in the administrative proceeding, she could have appealed the decision to the commonwealth courts of Puerto Rico. Second, Aponte submits that the court erred in holding that Kercado's due process rights were violated, since she could have filed an administrative appeal and received a hearing before her termination became fully operative. Third, the Secretary also contends that the district court erred in finding that Kercado had been dismissed for political reasons. She argues that the

charges brought against Kercado were substantive and legitimate grounds for dismissal. Fourth, it is argued that the district court erroneously granted Kercado compensatory and punitive damages. We consider each of these contentions seriatim.

Abstention

The Secretary avers that the district court erred when it failed to dismiss the case in accordance with the doctrine established in *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The federal plaintiff in *Younger,* John Harris, Jr., was being prosecuted under a state criminal synidicalism statute. He asked a three-judge federal district court to enjoin state criminal proceedings instituted against him, alleging that his prosecution would immediately and irreparably injure his first amendment rights. The three-judge court held that the criminal syndicalism statute was void due to vagueness and restrained the state from further prosecution of Harris. The Supreme Court reversed, holding that the district court should have abstained from hearing Harris' claim. The Court stated that considerations of federalism and comity dictated that federal court should refrain from deciding broad constitutional challenges to the legitimacy of a state criminal proceeding, provided that the state proceedings was undertaken in good faith and the federal plaintiff was given an adequate opportunity to press his constitutional claims in the state forum. *Younger v. Harris,* 401 U.S. at 43-53, 91 S.Ct. at 751-55.

Since *Younger,* the Supreme Court has invoked the abstention doctrine to overturn federal court challenges to the constsitutionality of pending state civil proceedings. *Penzoil Co. v. Texaco, Inc.,* ___ U.S. ___, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987); *Middlesex Ethics Committee v. Garden State Bar Association,* 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982); *Moore v. Sims,* 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979); *Trainor v. Hernandez,* 431

U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977); *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975). Those cases featured federal plaintiffs who had lodged broad constitutional attacks on the legitimacy of state civil proceedings instituted against them. In each case, the federal court was asked to enjoin a contemporaneous state civil proceeding pending against the federal plaintiff; the relief sought by the federal plaintiff was directed specifically at the pending state proceeding. Here, Kercado had not requested the federal district court to enjoin any state civil proceeding pending against her. Such a prayer would have been futile because the Secretary had already completed dismissal proceedings against Kercado; by its own terms, the order of dismissal became effective upon its receipt by Kercado. Accordingly, there was no proceedings for the district court to enjoin.

The Secretary urges, however, that because Kercado could have appealed the dismissal to the DPI Board of Appeals, the district court should have abstained and thereby forced Kercado to litigate her constitutional claims in a Puerto Rico forum. In effect, the Secretary argues that Kercado should have been permitted to bring a section 1983 suit in federal court because of the availability of an appeal within the Puerto Rico administrative and judicial apparatus. The Supreme Court, however, has held expressly that section 1983 claimants need not avail themselves of state judicial and administrative remedies before going to federal court. *Patsy v. Florida Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982); *Steffel v. Thompson*, 415 U.S. 452, 472-73, 94 S.Ct. 1209, 1222-23, 39 L.Ed.2d 505 (1974). The federal plaintiff in *Patsy* alleged that she had been denied employment opportunities by Florida International University on the basis of race and sex. Rather than pursue available state administrative remedies, she chose to file a section 1983 claim in federal court. The Supreme Court rejected "the

argument that a section 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies." *Patsy v. Florida Board of Regents,* 457 U.S. at 500, 102 S.Ct. at 2559.

The Secretary relies heavily on the Court's decision in *Ohio Civil Rights Commission v. Dayton Christian Schools,* 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986), which held that the principles of *Younger* abstention apply to pending state administrative, as well as state judicial, proceedings. The Ohio Civil Rights Commission instituted a state administrative proceeding against Dayton Christian Schools, alleging that it had dismissed a teacher because of her sex and her efforts to assert her legal rights. Dayton responded by asserting that the first amendment prohibited the Commission from exercising authority because the dismissal of the teacher had been undertaken pursuant to internal guidelines grounded in sincerely held religious beliefs to which all of its employees subscribed. While the state administrative proceeding was pending, Dayton Christian Schools filed a section 1983 action in federal court claiming that the administrative proceeding instituted by the Ohio Civil Rights Commission violated its first amendment right to free exercise of religion.

The Supreme Court ruled that the interests of comity and federalism rendered abstention appropriate under such circumstances. It held that Ohio had an important interest in regulating schools, even private religious schools. The Court also noted that Dayton Christian Schools would have an opportunity to raise its constitutional claims in the state administrative proceeding. Justice Rehnquist, writing for the majority, stressed that the Court's decision in *Dayton Christian Schools* did not conflict with its earlier holding in *Patsy*:[2]

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[2] The *Patsy* holding was reaffirmed recently by the Court in *Wright v. Roanoke Redevelopment and Housing Authority,* ___ U.S. _, 107

> The application of the *Younger* principle to pending state administrative proceedings is fully consistent with *Patsy v. Florida Board of Regents,* 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), which holds that litigants need not exhaust their administrative remedies prior to bringing a § 1983 suit in federal court. *Cf. Huffman v. Pursue, Ltd.,* 420 U.S. 592, 607-11, 95 S.Ct. 1200 1209-12, 43 L.Ed.2d 482 (1975). Unlike *Patsy,* the administrative proceedings here are coercive rather than remedial, began before any substantial advancement in the federal action took place, and involve an important state interest.

Dayton Christian Schools, 106 S.Ct. at 2723 n. 2.

The crucial distinction between *Dayton Christian Schools* and *Patsy* is that in *Patsy* the state proceeding was an option available to the federal plaintiff on her own initiative to redress a wrong inflicted by the state. In *Dayton Christian Schools* and the other absentention cases noted above, the federal plaintiffs sought to enjoin a pending state proceeding which they did not initiate, but in which their presence was mandatory. Here, unlike *Dayton Christian Schools,* the administrative proceeding is remedial rather than coercive. The administrative appeal process could be triggered only on Kercado's initiative if she wished to pursue her remedies within the Puerto Rico administrative framework. *Patsy* holds that she was not required to do so.

S.Ct. 766, 773 93 L.Ed.2d 781 (1987) ("the existence of a state administrative remedy does not ordinarily foreclose resort to § 1983"). This circuit has on a number of occasions expressly reaffirmed the holding in *Patsy* that § 1983 plaintiffs need not exhaust state remedies prior to filing suit in federal court. *Exeter-West Greenwich Regional School District v. Pontarelli,* 788 F.2d 47, 52 (1st Cir.1986); *Urbanizadora Versalles, Inc. v. Rivera Rios,* 701 F.2d 993, 999 (1st Cir.1983); *Developmental Disabilities Advocacy v. Melton,* 689 F.2d 281, 286 n. 15 (1st Cir.1982); *Developmental Disabilities Advocacy v. Melton,* 689 F.2d 281. 286 n. 15 (1st Cir.1982).

There is another important difference between *Patsy* and the absention cases. In *Dayton Christian Schools* and similar cases, the state proceeding is itself the wrong which the federal plaintiff seeks to correct via injunctive relief under section 1983. Those cases involved claims by plaintiffs that constitutional rights would be violated by virtue of the operation of the state proceedings. Comity and federalism concerns are at their highest in such cases since the legitimacy of both the state proceeding and its underlying statutory predicate are at stake. Abstention is appropriate in such instances because, absent bad faith or an adequate opportunity to raise the constitutional challenge in the state forum, state courts should have the first opportunity to construe the constitutionality of their own proceedings. "Minimal respect for the state processes, of course, precludes any presumption that the state courts will not safeguard federal constitutional rights." *Middlesex Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. at 431, 102 S.Ct. at 2521.

An inquiry into the appropriateness of abstention is warranted if the relief sought by the federal plaintiff is addressed directly to an ongoing state proceeding. *Moore v. Sims*, 442 U.S. at 431, 99 S.Ct. at 2381. In *Patsy* and cases like it,[3] abstention was unnecessary because the fed-

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[3] *E.g., Praprotnik v. City of St. Louis*, 798 F.2d 1168, 1172-73 & n. 4 (8th Cir.1986) (district court was not required to abstain from case brought by a city employee who alleged he was laid off for exercising his first amendment rights; fact that federal plaintiff had initiated an appeal to the civil service commission did not mandate abstention since he was not required to exhaust his state administrative remedies prior to filing the federal suit), *cert. granted*, ___ U.S. ___, 107 S.Ct. 871, 93 L.Ed.2d 826 (1987); *Clark v. Yosemite Community College Dist.*, 785 F.2d 781, 790 (9th Cir.1986) (federal plaintiff who alleged his teaching duties were interfered with because of the exercise of his first amendment rights need not exhaust his state administrative remedies); *Stana v. School Dist. of City of Pittsburgh*, 775 F.2d 122, 129-30 (3rd Cir.1985) (public school teacher denied employment opportunities need not exhaust state remedies); *Brantley v. Surles*, 718 F.2d 1354, 1358-60 (5th

eral plaintiffs did not allege injury arising from, or seek relief directed to, an ongoing state proceeding. Instead, the federal plaintiff claimed actual injury arising from action undertaken and completed by state actors. Thus, the state interest at stake was severely diminished because the federal plaintiffs were not seeking to mount a broad, constitutional attack on the legitimacy of the state proceedings or their underlying statutory predicate.

The dissent asserts that we can conclude that there is no challenge to an ongoing state proceeding only by "artificially separating" the "notice" which Kercado received on December 9 from the administrative remedy which was available to her. We note first that the document which Kercado received on December 9 was not simply a "notice," but was also an *order* cancelling her teacher's certificate and dismissing her from employment. The dissent's assertion that the dismissal order would take "effect only *after* the Board of Appeals of the Public Education System holds a full public hearing on the record" is flatly contradicted by the language of the order itself. It states: "The present Order shall become effective upon notification and receipt of the same by the accused." The issuance of the dismissal *order*, based on an unconstitutional motive, constituted the legal wrong suffered by Kercado. Kercado's rights were triggered at the moment the allegedly wrongful dismissal became effective. We have made no "artificial" separation here; we have simply separated the alleged wrong inflicted on Kercado from the remedies available to her.

The dissent errs by suggesting that there must be a hearing by the Board of Appeals before the dismissal order becomes final and binding; there is no such requirement. P.R.Laws Ann. tit. 18, § 274b. Review by the Board of Appeals is couched, by the language of the statute itself,

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Cir. 1983) (public school cafeteria worker discharged for exercising her constitutional rights need not exhaust state remedies.

as a remedy available to a teacher who is dissatisfied with a dismissal order: "If not satisfied with the order, the teacher thereby aggrieved *may* file a writ of appeal with the Board of Appeals. . . ." P.R. Laws Ann. tit, 18, § 274c (emphasis added). The dissent's description of the administrative appeal scheme omits a crucial fact: the dismissed teacher must take affirmative steps to initiate the appeal to the Board of Appeals. She cannot be coerced into appearing before the Board of Appeals, but is provided with an administrative remedy should she choose to avail herself of it. Undoubtedly, the administrative appeal scheme here is perfectly adequate for handling the vast majority of teacher dismissals, which ordinarily do not involve federal constitutional claims. But a teacher who alleges that her dismissal was motivated by an unconstitutional purpose need not pursue her administrative remedies within the Commonwealth system, but may proceed directly to federal court to press her claims. This is precisely the holding of *Patsy*.

Despite the Court's clear holding in *Patsy*, the dissent contends that the District Court of Puerto Rico should not have heard her claim until she had pursued her administrative remedy. This fails to recognize that there is a significant difference between a civil rights plaintiff who seeks to use the federal courts to stop or nullify an ongoing state proceeding in which she is a defendant, and a civil rights plaintiff who has an option to initiate a state proceeding to remedy a constitutional wrong perpetrated by a state actor. In the former case, absention is appropriate; in the latter, the *Patsy* rule prevails.

The dissent notes that the Court in *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975), stated that "a necessary concomitant of *Younger* is that a party . . . must exhaust his state appellate remedies before seeking relief in the District Court." Subsequently, the Court restricted the reach of this language, noting specifically that it applies only when a federal plaintiff

seeks to avoid state judicial appeals and, instead, use the federal courts "to annul the results of a state trial." *Wooley v. Manyard*, 430 U.S. 705, 710-11, 97 S.Ct. 1428, 1433, 51 L.Ed.2d 752 (1977). Here, of course, the federal plaintiff has made no such effort. Both *Huffman* and *Pennzoil v. Texaco*, ___ U.S. ___, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987), also cited by the dissent, hold that federal plaintiffs aggrieved by the results of a state trial must pursue their state judicial appeals before going to federal court. The instant case, like *Patsy*, involves a federal plaintiff aggrieved by an allegedly unconstitutional deprivation of employment by state officials. The Court has imposed no requirement that she pursue her administrative remedies in such circumstances.[4]

We believe that this matter is controlled by the principles outlined in *Patsy*. The instant case is not an appropriate occasion for abstention. The thrust of Kercado's claim challenges the basis of the dismissal action undertaken and completed by the Secretary. Kercado could have sought to remedy this allegedly wrongful act in a state administrative proceeding, but was not required by law to do so. She also claimed that the Secretary deprived her of due process by not granting her a pretermination hearing prior to issuing the letter of dismissal. Such a claim does not implicate absention concerns since it does not constitute a challenge to a pending state proceeding. The Secretary had completed her action against Kercado who, in turn, alleged that the substance and the procedural effectuation of that completed action violated the Constitution. Because Kercado's claim did not involve a challenge to the legitimacy of a pending state proceeding, we reject

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[4] The other lower court cases cited by the dissent are inapposite. They involve challenges by federal plaintiffs to ongoing coercive state proceedings initiated against them. The relief sought in those cases runs directly against the proceedings themselves. We have already noted that abstention is entirely appropriate in such circumstances. Such circumstances do not, however, prevail here.

the Secretary's contention that the lower court should have abstained.

Procedural Due Process

The Secretary disputes the district court's conclusion that Kercado's due process rights were violated when she was deprived of a pretermination hearing prior to receiving the dismissal order of October 28, 1985. Kercado's due process claim depends on her having had a property interest in her employment.[5] *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985); *Board of Regents v. Roth,* 408 U.S. 564, 576-78, 92 S.Ct. 2701, 2708-10, 33 L.Ed.2d 548 (1972). Property interests are not created by the Constitution, but are rooted in an independent source such as state law. *Cleveland Board of Education v. Loudermill,* 470 U.S. at 538, 105 S.Ct. at 1491. *Board of Regents v. Roth,* 408 U.S. at 577, 92 S.Ct. at 2708-10. The Secretary admits that a school superintendent is a career employee under Puerto Rico law. 3 L.P.R.A §§ 1349-52 (1978). Puerto Rico law clearly gave Kercado a property interest in her position; her status as a "career" employee permitted her to be fired only for "good cause." 3 L.P.R.A. §§ 1336 (1978).

Since Kercado had a property interest in her employment, the relevant constitutional question concerns what process is due her. The Supreme Court has stated:

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[5] The Secretary does not argue that by reinstating Kercado on November 18, 1985, the injury caused by the alleged deprivation on October 28 was somehow cured or rendered moot. Kercado's claim for emotional and mental distress arising from the alleged October due process violation survives irrespective of the subsequent reinstatement. *Cf. Carey v. Piphus,* 435 U.S. 247, 263-64, 98 S.Ct. 1042, 1052-53, 55 L.Ed.2d 252 (1978).

Kercado also alleged in her complaint that the pretermination hearing granted her prior to the December 9, 1985, dismissal was constitutionally inadequate. The district court did not decide this issue, and we have no occasion to do so here.

> An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for a hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656-57, 94 L.Ed. 865 (1950). We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest in his employment." *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971) (emphasis in original); *see Bell v. Burson*, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90 (1971). This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected interest in his employment. *Board of Regents v. Roth*, 408 U.S. at 569-70, 92 S.Ct. at 2705; *Perry v. Silnderman*, 408 U.S. 593, 599, 92 S.Ct. 2694, 2698-99, 33 L.Ed.2d 570 (1972).

Cleveland Board of Education v. Loudermill, 470 U.S. at 542, 105 S.Ct. at 1493.

The Secretary does not dispute that Kercado was entitled to a pretermination hearing prior to the first effort to dismiss her in October 1985. It is argued, however, that the administrative appeal which Kercado could have pursued was itself a pretermination hearing. The Secretary points out that the filing of an appeal by Kercado to the Board of Appeals would have suspended the effect of the dismissal order. She contends, therefore, that the availability of an administrative appeal provided Kercado with a pretermination hearing since the dismissal order would not become fully effective until after a final decision by the Board of Appeals.

We reject this argument. The dismissal order received on October 28 informed Kercado that the Secretary had acted to "permanently cancel your teacher certificate(s)

. . . and . . . dismiss you from your post." The order stated that it became "effective upon the service and receipt" of it by Kercado. The plain meaning of these words is that Kercado's discharge took effect on her receipt of the order on October 28. That the binding effect of such an order would be suspended upon the filing of an "appeal," does not transform that "appeal" into a pretermination hearing.[6] As the Eighth Circuit stated in the case of *Schultz v. Baumgart,* 738 F.2d 231 (8th Cir.1984):

> [I]f Schultz was indeed fired in violation of his due process rights, the availability of *post-deprivation* grievance procedures or a board hearing would not have cured the violation. Schultz was entitled to notice and a meaningful opportunity to respond *before* he was terminated. If he was terminated without those protections, the constitutional deprivation was then complete. Schultz need not have exhausted other state remedies before bringing his section 1983 claim.

738 F.2d at 237 (emphasis in original.)

Kercado's opportunity to appeal the Secretary's order after being informed of the action is constitutionally inadequate; due process requires that she be given notice of the charges and an opportunity to respond *before* the action is taken. *Cleveland Board of Education v. Loudermill,* 470 U.S. at 546, 105 S.Ct. at 1496. We recognize that the Secretary was not obliged to conduct a full evidentiary hearing prior to dismissing Kerdaco. *Id.* at 545, 105 S.Ct. at 1495; *Moody v. Town of Weymouth,* 805 F.2d 30, 33 (1st Cir.1986). But Kercado was not given notice of the charges and any opportunity to respond prior to the Secretary's action on October 28. We affirm the district court's

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[6] This is especially true here because the filing of the appeal would still adversely affect Kercado's rights; her employment and pay would be suspended until the Board's final decision.

holding that her procedural due process rights were violated.

The Motives Behind Kercado's Dismissal

The first amendment prohibits a government agency from dismissing public employees based on their political affiliation unless membership is an appropriate requirement for a particular position. *Branti v. Frankel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). The parties agree that political affiliation is not a proper qualification for a school superintendent position.

The Secretary challenges the district court's conclusion that Kercado was dismissed for political purposes. At trial, Kercado bore the initial burden of demonstrating that her political affiliation was a substantial or motivating factor underlying the Secretary's decision to discharge her. *Mt. Healthy City School District v. Doyle,* 429 U.S. 274, 285-87, 97 S.Ct. 568, 575-76, 50 L.Ed.2d 471 (1977); *Rosaly v. Ignacio,* 593 F.2d 145, 148-49 (1st Cir.1979). Once that threshold showing had been met, the Secretary was obliged to demonstrate that Kercado would have been dismissed irrespective of her membership in the PNP. We cannot uphold the verdict unless the trial court correctly found that she would not have been dismissed "but for" her political affiliation with the PNP. *Mt. Healthy City School District v. Doyle,* 429 U.S. at 287, 97 S.Ct. at 576; *Rosaly v. Ignacio,* 593 F.2d at 149. The district court made extensive findings of fact with respect to events leading up to Kercado's dismissal. These factual findings must be accepted unless we are "left with a definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985); *Scarpa v. Murphy,* 806 F.2d 326, 329 (1st Cir. 1986).

The district court ruled that Kercado carried her initial burden of proving that her political affiliation was a substantial factor motivating her dismissal. Proof of such an improper motive may be shown via circumstantial evidence. *Rosaly v. Ignacio,* 593 F.2d at 149. The trial judge was aware of the highly charged political atmosphere in Puerto Rico following the PPD's election victory over the PNP in 1984. He highlighted Kercado's long, active and visible membership in the PNP. The evidence showed that the DPI Secretary and Undersecretary, the DPI Regional Director for the region which included the Dorado district, and the Regional Director's deputy, all were members of the PPD. The trial judge noted that one of the charges filed against Kercado was based solely on a statement by assistant superintendent Hector Lopez Maldonado, a well known PPD member who had once run for mayor of Dorado. The evidence revealed that Kercado and Lopez had an extremely antagonistic relationship. The trial court held that the Secretary's willingness to appoint Lopez as assistant superintendent—despite widespread knowledge of his hostile relationship with Kercado and stronger support from the appointments committee for two other candidates—, and her refusal to investigate complaints that Lopez' conduct, evidenced her willingness to politicize personnel decisions. Finally, the trial court noted various instances in which the DPI officials investigating Kercado's conduct failed to elicit Kercado's version of the events underlying the charges against her. The court surmised that the investigators' conduct indicated that they were more interested in building a case against Kercado to support her dismissal than in actually assessing the merits of the charges against her. We agree with the district court that these circumstances, when taken together, support a finding that Kercado's political affiliation was a substantial factor motivating her dismissal.

After making this threshold determination, the trial court then focused on whether Kercado would have been

discharged "but for" her political affiliation with the PNP. The court noted that in her eighteen years as a DPI employee, Kercado had never been reprimanded for her job performance, but instead had been "steadily rewarded for her work with job promotions." The court then undertook an evaluation of the merits of the four charges brought by the Secretary against Kercado.

The first charge levied against Kercado alleged that she failed to process fourteen teacher assistant appointments, in contravention of the order of Leida Cintron, the DPI Regional Director for Bayamon. The committee assigned to appoint teacher assistants in Dorado met on August 20, 1985, but was able to agree on only three candidates. The district court found that the failure to select the other eleven candidates occurred in part because the Regional Director's deputy, Maria Cordova, refused to accept the committee's recommendations. The committee's inability to reach a consensus meant that Cintron herself would choose the remaining teacher assistants. On October 4, 1985, six weeks after the August meeting, Cintron sent Kercado a list of the additional eleven appointees. The Secretary avers that Kercado's failure to process the appointments within three days constituted an act of insubordination. The district court's analysis of the evidence on this point is unassailable. The court failed

> to see how defendant could honestly believe that plaintiff should have realized the urgency of the situation and processed the aides immediately when it took the Bayamon Regional Director, herself, over six weeks to make the selection—from August 20, 1985 when the committee to select the aides met and no consensus was reached, until October 4 when she sent plaintiff a letter with her choices for the appointments. Plaintiff claims she received the letter October 11, 1985 and she was dismissed October 28, 1985. This left her less than three weeks to process the appointments. Given the fact that the Regional Di-

> rector never gave plaintiff a time limit to make the appointments and given the situation in plaintiff's office—that she was short-handed and it was the beginning of a school year—all facts of which defendant was aware, we cannot find that defendant was sincere in believing plaintiff's conduct was a purposeful refusal to follow the directives of her superior or an overt act of insubordination worthy of dismissal.

The second and third charges brought against Kercado concerned her decision to keep two teachers working in the superintendent's office during August, 1985, after thay had been reinstated to their regular teaching positions. The Secretary averred that such conduct was insubordinate, since it defied a DPI directive ordering that all personnel be located in the work unit to which they were assigned. An amendment to the directive provided that personnel could be reassigned from their permanent positions in order to take care of "special situations that may arise in a school or school district." Kercado maintained that her temporary use of the two teachers was prompted by the "special situation" of severe understaffing in her office. It is undisputed that Kercado's office was short on personnel during the summer of 1985. Indeed, on July 2, 1985, Kercado sent a letter to the Governor complaining that fourteen positions in her office remained vacant. She stated in the letter that she had unsuccessfully complained about the shortage through the proper channels. A copy of this letter was also sent to the Secretary. The Secretary does not deny that Kercado's office was suffering personnel shortages, but submits that "understaffing does not justify hierarchical disobediendce."

The evidence shows that Kercado received permission to use the two teachers from their respective principals. There was no evidence that the temporary reassignment of the teachers disrupted the schools in which they worked. The trial judge found that temporary reassignments for

"special situations" were expressly permitted by the June 29 amendment to the DPI directive on teacher reassignment. There was evidence that it has been a common practice to temporarily use teachers to perform administrative tasks in the superintendent's office. Moreover, neither the DPI directive or reassignments, nor its June amendment, specify particular procedures to be followed in order to temporarily use a teacher to meet the special needs of the district. The district court, therefore, concluded that with respect to charges two and three filed against Kercado there was no evidence "to indicate a purposeful act of insubordination by plaintiff which would warrant a dismissal."

The fourth charge against Kercado involved her dealings with assistant superintendent Hector Lopez Maldonado. As mentioned earlier, it was evident that there was considerable friction between Lopez and Kercado dating back long before he was assigned to work with her in the same office. Nevertheless, on September 19, 1985, slightly more than a month before Kercado was dismissed, the Secretary ignored the recommendation of the appointments committee and assigned Lopez to the position of assistant superintendent.

The Secretary charged Kercado with altering the duties of the assistant superintendent, thereby disrupting the smooth functioning of the Dorado office. Kercado claimed that Lopez refused to perform his assignments and caused problems for the staff in the office. There was ample evidence submitted by Kercado documenting complaints levied by Dorado district personnel against Lopez. In essence, this fourth charge involved a credibility contest between Lopez and Kercado; each testified of harassment and antagonism from the other; each accused the other of inhibiting the efficient operation of the Dorado superintendent's office; and there was evidence that political motives engendered the hostility they displayed toward one another. "[F]indings based on witness credibility are lodged firmly

in the province of the trial court and we are loathe to disturb them absent a compelling showing of error." *Scarpa v. Murphy,* 806 F.2d at 328; *Anderson v. Bessemer City,* 470 U.S. at 575, 105 S.Ct. at 1512-13. The trial judge accepted Kercado's assertion that Lopez's abusive and uncooperative behavior forced her to relieve him of some of his duties. The court characterized the Secretary's charge that Kercado refused to give Lopez his proper assignments, as the "weakest" of all the allegations brought against her. Indeed, the trial judge stated that "it is not an unfounded conclusion that the Secretary, knowing the antagonism between plaintiff and Lopez, appointed Lopez as Assistant Superintendent in order to harass the plaintiff."

We see no reason to disturb any of the factual findings made by the district court. The Secretary, in effect, has sought to reargue to this court the merits of the charges it originally brought against Kercado. The trial judge's assessment of the merits of those charges is entitled to considerable deference. *See Jimenez-Fuentes v. Torres-Gaztambide,* 807 F.2d 236, 238-39 (1st Cir.1986) (en banc), *cert. denied,* ___ U.S. ___ , 107 S.Ct. 1888, 95 L.Ed.2d 496 (1987); *De Choudens v. Government Development Bank,* 801 F.2d 5, 7 (1st Cir.1986) (en banc), *cert. denied,* ___ U.S. , 107 S.Ct. 1886, 95 L.Ed.2d 494 (1987). We agree with the district court that, even conceding the facial validity of the charges against Kercado, they are not so serious as to warrant the discharge of a capable eighteen-year career employee. The district court correctly concluded that, when the merits of these charges are considered, it is evident that they provide "little support for [the Secretary's] claim that [Kercado's] conduct was insubordinate requiring the termination of her employment with DPI." Accordingly, we affirm the district court's determination that Kercado would not have been dismissed "but for" her political affiliation with the PNP.

Damages

The Secretary challenges the district court's award of compensatory and punitive damages. Kercado proved that she had been dismissed from her job for political reasons and had been deprived of her procedural due process rights. The district court reinstated Kercado and awarded her $12,074.50 in back pay. Based on our reading of the record and the briefs, this appears to be in error. The court apparently computed its back pay award from the date of plaintiff's dismissal, October 28, 1985. Appellants claim, however, that Kercado was paid through December 9, 1985, and she does not deny this. The court also granted Kercado $15,000 to compensate for the pain and suffering caused by the deprivation of her constitutional rights. Compensatory damages for mental and emotional distress are recoverable for violations of rights protected by section 1983. *Memphis Community School Dist. v. Stachura,* 477 U.S. 299, 106 S.Ct. 2537, 2542-43, 91 L.Ed.2d 249 (1986); *Carey v. Piphus,* 435 U.S. 247, 264, 98 S.Ct. 1042, 1052-53, 55 L.Ed.2d 252 (1978). When reviewing a challenge to the basis of an award for compensatory damages, "we rely heavily on the judgment of the trial court, who has had the benefit of hearing all of the evidence and observing the demeanor of the witness." *Clark v. Taylor,* 710 F.2d 4, 13 (1st Cir. 1983). Kercado testified of the emotional and mental distress caused by her abrupt dismissal on October 28 and by the Secretary's second, and more successful, effort to discharge her in December. We find the district court's award of $15,000 for compensatory damages reasonable under the circumstances.[7]

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[7] The court below did not specify how much of these compensatory damages stemmed from the deprivation of her procedural due process rights, and how much stemmed from the improper dismissal. The Supreme Court has stated that a federal plaintiff alleging a procedural due process violation must "convince the trier of fact that he actually suffered distress because of the denial of the due process itself." *Carey*

The trial judge also awarded Kerdaco $10,000 in punitive damages. The court concluded that the Secretary was "callously indifferent to plaintiff's federally protected rights," thus warranting the imposition of punitive damages. *Smith v. Wade,* 461 U.S. 30,56, 103 S.Ct. 1625, 1640, 75 L.Ed.2d 632 (1983); *Clark v. Taylor,* 710 F.2d at 14. The Secretary's conduct, as found by the district court, demonstrated a steadfast intent to discharge Kercado, irrespective of her constitutional rights or the actual merits of the charges brought against her. The award of punitive damages was therefore appropriate, and we do not find it excessive.

Affirmed and remanded for a recomputation of the back pay award. Costs awarded to appellee.

BREYER, Circuit Judge (dissenting).

I do not disagree with the majority about the basic principles of federal law that apply to this case. On the one hand, a person who claims that someone has violated his civil rights may bring suit in federal court under 42 U.S.C. § 1983 without exhausting remedies that state law makes available. *See Patsy v. Board of Regents,* 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). On the other hand, *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and its progeny held that if a state has already begun a state judicial or administrative proceeding against a person, that person may not proceed in federal court, even with a § 1983 suit, if that suit risks interfering with important state interests and if the federal plaintiff can raise constitutional challenges in the state

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v. Piphus, 435 U.S. at 263, 98 S.Ct. at 1052. Here, Kercado testified that she suffered distress ever since the Secretary's action on October 28, when her procedural due process rights were violated. She also testified of the distress she suffered due to the actual loss of her job. We do not think the failure to identify the portion of compensatory damages arising from each claim to be of consequence under the circumstances of this case.

proceedings. *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982) (setting out basic test for invoking *Younger*-type abstention); *see Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619, 106 S.Ct. 2718, 2723, 91 L.Ed.2d 512 (1986) (extending the *Younger* doctrine, in the context of a § 1983 action, to state administrative proceedings).

I disagree with the majority, however, about the application of those principles to this case. I think the plaintiff was, when she brought her federal suit, very much in the midst of Commonwealth administrative proceedings. In the Commonwealth, as in many states, local authorities cannot dismiss a tenured teacher without fairly elaborate administrative proceedings that involve notice of charges, a full-blown administrative hearing, and either an administrative appeal, judicial review, or both. P.R. Laws Ann. tit. 18, §§ 274-274o; *see, e.g.*, Cal. Educ. Code §§ 44932-44945; N.J. Stat. Ann. §§ 18A:6-10 to -27; Wash.Rev. Code §§ 28A.70.160-.170. Puerto Rico's statute provides that to "cancel" or "suspend" a tenured teacher's educational certificate, the "Secretary of Education . . . shall serve on the teacher an order of suspension or cancellation . . . jointly with a complaint specifying the charges." P.R. Laws Ann. tit. 18. §§ 274, 274a. The order "shall be final" after ten days only if the teacher does not "appeal" from it. P.R. Laws Ann. tit. 18, § 274b. With a few possible exceptions not here relevant, the order (regardless of what it says) legally takes effect only *after* the Board of Appeals of the Public Education System holds a full public hearing on the record, at which the teacher may be represented by counsel, present evidence, and cross-examine the witnesses presented by the education authorities. P.R. Laws Ann. tit. 18, §§ 274d-274h. If the Board decides against the teacher, he may obtain judicial review in the Commonwealth courts. P.R. Laws Ann. tit. 18, § 274l.

How can the majority find that the plaintiff was not in the midst of this procedure when she brought her federal law suit? The majority seems to do so only by artificially separating the statute's "sending-the-order" provision from the rest of the statute. The majority reads the "sending-of-the-order" provision as if it permitted the Commonwealth to dismiss a teacher without a full-blown hearing simply by sending the piece of paper called an "order", as if the sending of that piece of paper constituted the legal wrong and all the rest provided by the statute were but a state remedy. In any contested case, however, the sending of the "order" and the hearing on "appeal" are steps within an integrated, statutory administrative scheme—a scheme similar to those often used by states to dismiss tenured teachers. Unless one viewed Puerto Rico's law as embodying an effort to dismiss tenured teachers without a hearing (which neither the statutory language nor common sense suggest is so) this case fits squarely within the *Younger* doctrine. Regardless, even if one calls the hearing stage an administrative "appeal" from the sending of the "order," relevant Supreme Court precedent would still seem to require the plaintiff to take such an appeal before bringing her § 1983 action in federal court. *Pennzoil v. Texaco*, ___ U.S. ___, 107 S.Ct. 1519, 1527 & n. 13, 95 L.Ed.2d 1 (1987) (holding in the context of a § 1983 suit that the availability of a judicial appeal renders a proceeding "pending" for purposes of *Younger*-type abstention); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607-09 & n. 21, 95 S.Ct. 1200, 1211 & n. 21, 43 L.Ed.2d 482 (1975) (holding that "a necessary concomitant of *Younger* is that a party . . . must exhaust his state appellate remedies before seeking relief in the District Court" and noting that according such deference to already-initiated state proceedings is consistent with a general no-exhaustion doctrine); *see Patsy v. Board of Regents*, 457 U.S. at 518-19, 102 S.Ct. at 2568-69 (White, J., concurring in part) (noting that the Court's holding in *Patsy* "is also fully consistent

with [the Court's] decisions that a defendant in a civil or administrative enforcement proceeding may not enjoin and sidetrack that proceeding by resorting to a § 1983 action in federal court" (citing *Huffman*)); *see also Malachowski v. City of Keene*, 787 F.2d 704, 708 (1st Cir.) (holding that a § 1983 plaintiff must first take available state appeals), *cert. denied*, ___ U.S. ___, 107 S.Ct. 107, 93 L.Ed.2d 56 (1986); *Coruzzi v. New Jersey*, 705 F.2d 688, 690 (3d Cir.1983) (similar); *Carter v. Maryland Commission on Medical Discipline*, 639 F.Supp. 542, 546 (D.Md. 1986) (similar). For these reasons, it seems to me the majority's view both misreads Puerto Rico's law and, in any event, runs contrary to relevant Supreme Court authority.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 85-2261 AL

IPCIA M. KERCADO MELENDEZ,

Plaintiff,

v.

AWILDA APONTE ROQUE,

Defendant.

OPINION AND ORDER

Plaintiff, Ipcia M. Kercadó Melénez, a career employee for eighteen years with the Department of Public Instruction ("DPI"), filed this complaint against defendant, Awilda Aponte Roque, Secretary of DPI, under 42 U.S.C. sects. 1983 claiming she was discharged from the position of Superintendent of the Dorado School District in violation of the Fifth and Fourteenth Amendment Due Process clause and that the discharge was motivated by political discrimination in violation of the First Amendment.[1] As relief plaintiff seeks a permanent injunction reinstating her as Superintendent of the Dorado School District, restoring all her teaching certificates and compensating her with compensatory and punitive damages.

A five day bench trial of this case was held in March, 1986. Evidence was presented addressing plaintiff's claim that her termination violated both due process and the

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[1] Plaintiff also filed this action under 42 U.S.C. sects. 1985, 1986. The evidence presented at trial was not addressed to either of these statutes. Consequently, we make no ruling on this basis.

First Amendment. Based on the pleadings, the evidence presented at trial, and after considering the demeanor and credibility of the witnesses, the Court enters the following findings of facts and conclusions of law.

PROCEDURAL HISTORY

After working as a DPI employee for eighteen years, plaintiff was terminated from the position of Superintendent of the Dorado School District for the first time on October 28, 1985. On that date plaintiff received a complaint signed by the defendant, the Secretary of DPI, ordering her dismissal, cancelling of all her certificates to teach in both public and private schools,[2] and charging her with seven infractions of the Teachers' Misconduct Act, Law 115 of June 30, 1965, 18 L.P.R.A. section 274 ("Law 115").[3] Plaintiff was also informed through the complaint of her right to appeal the Secretary's action within ten days to the DPI Board of Appeals.

Within ten days of receiving defendant's order plaintiff appealed the charges to the Board of Appeals. Plaintiff also filed the present action and petitioned this Court for a Temporary Restraining Order seeking to enjoin her dismissal. After filing the claim in this Court plaintiff withdrew her appeal before the Board of Appeals.

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[2] Plaintiff holds teaching certificates to work as an Elementary teacher, Principal, General Supervisor and Superintendent of Schools.

[3] The defendant's action dismissing plaintiff and cancelling her certificates was justified on the basis of the following provisions of Law 115, 18 L.P.R.A. 274:

. . .

(c) Negligence in the performance of the duties as a teacher.

(d) Insubordination . . .

(g) Observance of improper behavior injurious to the good name of the Public Education.

Plaintiff's petition for a TRO was based on the claim that she was separated from employment without a pre-termination hearing in violation of due process as required by CLEVELAND BD. of EDUCATION v. LOUDERMILL, ___U.S. ___, 105 S.Ct. 1487 (1985). Rather than granting a TRO, this Court set a "show cause" hearing for November 18, 1985, at which the parties were to come prepared to address the due process issue and plaintiff's right to a preliminary injunction on that basis.

On the very day set for the "show cause" hearing the charges against plaintiff were withdrawn and she was reinstated as Dorado Superintendent, thereby mooting the preliminary injunction sought as relief. On November 25, 1985 plaintiff was delivered a letter requesting her presence at an informal hearing on "new" charges against her. The hearing was held the next day, November 26, 1985, before Elba Rodriguez Fuentes, the Director of the DPI Legal Division and two other attorneys with the Department. Elba Rodriguez read plaintiff the charges against her and plaintiff was given the opportunity to respond. No evidence or witnesses were presented by either side.

On December 9, 1985 plaintiff was served for the second time with a complaint signed by defendant ordering her dismissal and cancelling her Superintendent's certificate. The complaint made four charges against plaintiff which, except for the condensed form, were identical to the seven charges made in the original October 28, 1985 complaint.

Plaintiff did not file an appeal of this order to the DPI Board of Appeals. Instead, she pursued the litigation of her rights in the present action. During the period between plaintiff's first discharge on October 28, 1985 and the second discharge on december 9 a trial date was set by this Court and discovery proceeded. While litigation was ongoing in this Court defendant withdrew the first complaint against plaintiff and no administrative proceeding con-

cerning plaintiff's dismissal was commenced before the DPI Appeals Board.[4]

FACTS

Plaintiff is an active member of the New Progressive Party ("NPP"). She has been a frequent attendant at NPP functions and speaks freely of her political party affiliation. Defendant, plaintiff's immediate supervisor and other DPI employees were well aware of plaintiff's political affiliation.

Defendant is a member of Popular Democratic Party ("PDP"). After eight years of NPP administration in Puerto Rico, the PDP regained power in the November, 1984 election. Following the transition to a PDP administration in January, 1985 the defendant, Awilda Aponte Roque, was appointed Secretary of DPI.

Plaintiff began to work for the DPI in 1967, after having completed a Bachelor's and Master's Degree in Education

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[4] Prior to trial defendant requested plaintiff's claim to be dismissed for failure to exhaust state remedies or in the alternative, that this Court abstain in favor of an administrative hearing before the DPI Appeals Board. We denied defendant's request. Exhaustion of state remedies is not a prerequisite to bring a civil rights claim under 42 U.S.C. sect. 1983 in federal court. *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 499, 102 S.Ct. 2557, 73 L.Ed. 2d 122 (1982).

Furthermore, there was no reason for abstention since no administrative hearing was pending while litigation was proceeding in this Court. Though our denial of defendant's request for abstention was made prior to the recent Supreme Court opinion in *Ohio Civil Rights Commission v. Dayton Christian Schools*, No. 85-488 (June 27, 1986), the decision is distinguishable from the situation before us and would not alter our ruling. In support of our decision denying defendant's request we refer to the oft quoted language from *Mitchum v. Foster*, 407 U.S. 225,242, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972)[quoting *Ex Parte Virginia*, 100 U.S. 339,346, 25 L.Ed. 676 (1880)]: "[t]he very purpose of section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial'."

at Interamerican University in San Juan, Puerto Rico. Since being hired by DPI plaintiff has worked as an elementary teacher, principal of an elementary school, Deputy Director and Director of the Institute of Educational Services. In 1980 she was appointed Superintendant of the Dorado School District, a position she held until her termination in 1985. As Dorado Superintendent plaintiff was a "career" employee as defined by the Puerto Rico Personnel Act, 3 L.P.R.A sect. 1349. Under the law of Puerto Rico, a "career" employee with DPI, or any other Commonwealth agency, can be involuntarily terminated from employment only for "just cause."[5]

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[5] The Puerto Rico Personnel Act, 13 L.P.R.A. sect. 1336(4) states:

> (4) The appointing authorities may remove any career employees for good cause and upon previous preferment of charges, in writing, and upon prior holding of an administrative hearing, if the employee so requests.

Law 115, 18 L.P.R.A. sect. 274 states:

Procedure for cancellation of certificates—Causes

The Secretary of Education may permanently cancel the certificate of any teacher, or suspend such certificate for a definite period of time, through the procedure herein provided, for any of the following causes:

(a) Prevarication, bribery or immoral conduct.

(b) Incompetency in the discharge of his duties as a teacher.

(c) Negligence in the discharge of his duties as a teacher.

(d) Insubordination.

(e) Being convicted of a felony by any court.

(f) Incurrence of the conduct forbidden by sections 249-249e of this title.

(g) Disorderly or improper conduct, or such as is prejudicial to the good name of the public education system of Puerto Rico.

(h) Holding a certificate through fraud or deceit.

See also, Diaz González v. Tribunal Supremo, 102 D.P.R. 195 (1974);

During her eighteen years of employment with DPI, plaintiff was never formally reprimanded for her job performance until October 28, 1985, when she received the first notice of dismissal. In fact, a witness for plaintiff, Regina Sevilla de Santiago, a 31 year veteran with DPI who served as plaintiff's supervisor for eight years including the years 1980-1984 while plaintiff was Dorado Superintendent, testified that plaintiff was very professional in her work and was highly dedicated to DPI and to her duties as Superintendent of the Dorado schools.

Seven charges were made against plaintiff when she was terminated for the first time on October 28, 1985. On December 9, 1985, when she was discharged for the second time, four charges were made. Other than the condensed format the four charges made in December are identical to the seven made in October. The charges against plaintiff to justify her dismissal state as follows:

> 1. You did not process the appointments of fourteen Teacher Assistants in the School District of Dorado thus disobeying the orders of the Director of the Bayamon Educational Region.
>
> 2. You kept Mrs. Clara Luna Garcia working in your office during the month of August, 1985, without the authorization of the Regional Director nor that of the Secretary of Public Education, knowing that Mrs. Luna had been reinstated to her permanent position as a Mathematics Teacher.
>
> 3. You kept Mr. José W. Ramos Urbina working in your office without the authorization of the Regional Director nor that of the Secretary of Public Education, knowing that he had been reinstated to

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Pastor Lozada v. Director Ejecutivo, 101 D.P.R. 923 (1973), interpreting the Personnel Act upon which the present Personnel Act of Puerto Rico is based.

his permanent position as elementary school teacher, effective July 1st, 1985.

4. You altered the duties of Mr. Hécter J. López Maldonado, Assistant Superintendent, making it impossible for him to work normally in the position to which he was appointed, thus affecting the smooth functioning of the Dorado School District.

Defendant claims the first charge—that plaintiff failed to appoint the teachers' aides—was an act of insubordination in violation of Law 115. Plaintiff had received a letter dated October 4, 1985 from her supervisor, the Bayamón Regional Director, Leida Cintrón, with instructions to appoint the following persons selected by Ms. Cintrón to serve as teachers' aides. Neither this letter nor a follow-up letter to plaintiff from Ms. Cintrón dated October 18, 1985—asking plaintiff for an update on the teachers' aides—gave plaintiff a time limit within which to process the appointments.

Prior to defendant's appointment as DPI Secretary teachers' aides were selected by plaintiff, as the Superintendent of the district with the aid of the Dorado School Principals. After defendant took office a new system was instituted. The fourteen teachers' aides to be appointed in the Dorado District were to be selected by a committee of Dorado School Principals, plaintiff—Dorado Superintendent, and Maria Córdova de Zayas—the Assistant Director of the Bayamón Region serving as the Regional Director's representative. In the case that no consensus was reached the aides were to be selected by Leida Cintrón, the Bayamón Regional Director.

On August 20, 1985 the committee met. Consensus was reached on only three people. As for the remaining ten appointments, for which there was no consensus, the Re-

gional Director herself made the selection and sent plaintiff the letter dated October 4, 1985 with her decision.[6]

Plaintiff claims her failure to appoint the aides was not an act of insubordination. She testified that she did not receive the Regional Director's letter until October 11, 1985, that she was understaffed, and that the appointment process takes work to complete. Plaintiff claims she did not have sufficient time to make the appointments prior to her dismissal on October 28, 1985.

The second and third charges against plaintiff—that she kept Clara Luna Garcia and José Ramos Urbina working in her office—are, according to defendant, acts of insubordination in violation of defendant's directives outlines in a May 20, 1985 memo to all DPI Superintendents and an Amendment to Circular Letter 20-84-85 issued July 19, 1985. The May 20, 1985 memorandum stated that DPI had a problem of a large number of teaching personnel working in positions other than those to which they were appointed. To correct the situation the memo ordered all employees, effective July, 1985, to be located in the work unit to which they were assigned. The July 19, 1985 memorandum amending Circular Letter 20-84-85 established the proper procedure for reassigning teachers from their appointed positions. The amendment provides that reassignments are allowable on petition of the employee or when services of an employee are necessary for, among other reasons, a "special situation" in the school district.[7]

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[6] The evidence indicates that no consensus was reached in part because the Regional Director's representative, Maria Córdova, refused to accept the committee's recommendations. The evidence further indicates that both Ms. Cintrón and Ms. Córdova are affiliated with the PDP.

[7] The pertinent portion of the July 19, 1985 memo states:

> According to the rules and regulations for teacher appointments, the School Superintendent may reassign in his/her school district the personnel with teaching and student service duties, and special

Plaintiff denies that the temporary use of Clara Luna and José Ramos was an act of insubordination. Prior to defendant's appointment it was accepted practice to borrow the services of a teacher when the Superintendent's office was short of staff. Plaintiff testified that she assumed that the shortage of employees in her office constituted a "special situation" within the meaning of the July 19, 1985 amendment to the Circular Letter and, therefore, the temporary reassignment of Clara Luna Garcia and José Ramos was proper.

It is undisputed that plaintiff's office was shorthanded at that time. On July 2, 1985 plaintiff sent a letter to the Governor, with a copy to the defendant, explaining her problem of staff shortages and listing 14 positions which remained unfilled.[8] Plaintiff stated in the letter that she

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teachers in the same category, upon request of the employee or for service needs. . .

Service needs shall be understood as

. . .

d. taking care of special situations that may arise in a school or school district.

[8] According to the July 2, 1985 letter to the Governor, the following positions were vacant:

1. Assistant Superintendent
2. Asst. Superintendent (supposedly)
3. Asst. Superintendent Chapter I
4. Sup. Special Education Zone
5. Supervisor Spanish Zone
6. Supervisor Mathematics Zone
7. Director Maguayo Elem. School
8. Director Jose de Diego School
9. Director Pre-vocational Center
10. Custodians
11. Sec. - Clerk Typist II
12. Executive Official
13. Sec. - Clerk Typist
14. Clerk

had notified the proper people of this problem without success and, she added, that she hoped there was no "persecution" involved in creating this situation.

In the case of both Clara Luna and José Ramos plaintiff asked permission of the Principals of the schools where they were assigned to use them temporarily. Clara Luna was assigned to the José Alegria Elementary School as a Mathematics teacher and was to report there at the beginning of August. Instead, plaintiff asked her principal, Hernán Burgos, if Ms. Luna could work in the Superintendent's office from August 5 to August 30, the busiest month for the Superintendent.[9] Clara Luna returned to her teaching position the first week of September. In the case of Jose Ramos, he was originally assigned to the Luis Muñoz Rivera School, however, on August 30, 1985 plaintiff received a letter from the principal of that school explaining that his position was in excess and that he would be returned to the office of the Superintendent. On September 5, 1985 Ramos was reassigned to the Pedro López Canino School and on September 11, 1985, plaintiff wrote a letter to the principal there, Marie Carvajal, asking permission to use Ramos in her office until new staff was appointed to her office.

Plaintiff denies the validity of the fourth charge—that she altered the duties of Héctor López Maldonado, the newly appointed Assistant Superintendent. She claims that Héctor López was given his proper assignments but refused to cooperate and caused problems with the staff in her office and at schools in the district.

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[9] There is a discrepancy in the evidence as to when plaintiff communicated to Mr. Burgos in writing requesting the use of Clara Luna. Plaintiff presented a letter dated earlier August, while defendant presented a similar letter dated early September. Whenever the written request was sent the evidence is clear that plaintiff had spoken to Mr. Burgos in early August about using Clara Luna temporarily.

Héctor López and Evaristo Rosado Colón were appointed plaintiff's Assistant Superintendents in early September and began work on or near September 19, 1985. Plaintiff was not pleased with Héctor López' appointment as her assistant. Plaintiff and Lopez had known each other for years and the record is unequivocal that there was no love lost between them.

Assistant Superintendents of the Dorado School District were to be appointed by a committee of plaintiff—the Dorado Superintendent, Maria de Córdova—the Assistant Regional Director, and Héctor J. Torres—a representative from the DPI central office. The committee interviewed candidates and voted on their preferences. A consensus was reached on at least two candidates; Héctor López was not one. Despite the fact that unanimous support existed for two candidates and there was no such support for Héctor López, Hector Lopez was appointed Assistant Superintendent by the defendant.

The evidence in the case is rife with incidents documenting the tumultuous relationship between plaintiff and Lopez both before and after his appointment.[10] Plaintiff also presented letters and testimony evidencing that several other people on her staff and at the other schools had problems working with López and found his conduct offensive.

Of particular note to this case is an incident which occured prior to López' appointment while he was working under plaintiff as Director of the Work and Study Center in the Dorado District. In January, 1985 plaintiff wrote to the defendant requesting a meeting with her and López to discuss the problems at the Center. Plaintiff testified

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[10] The record is clear that plaintiff and López had an antagonistic relationship. At one point in October 1985 the two entered into a heated verbal battle calling each other obscene names. Following the incident López filed criminal charges against plaintiff for breach of the peace. No probable cause was found for the charges.

that the Secretary accused her during the meeting of causing the problems at the Center by politically persecuting López. López is a well known PDP member. In 1980 he was a candidate for Mayor of Dorado. Defendant and López deny that defendant made such an accusation at the meeting.

On March 19, 1985 plaintiff wrote the Governor about the meeting with the defendant and López at the Work and Study Center and about another meeting with the defendant and teachers and employees of the Bayamón region. In this letter plaintiff accused the defendant of not knowing "anything about the functioning of a school district and to top it off she [the defendant] passes judgment and makes decisions without investigation and dialogue." The defendant responded to the letter cordially without addressing plaintiff's accusations. This letter was never cited in the charges against plaintiff or the testimony as a reason for plaintiff's dismissal.

It is also noteworthy that plaintiff filed a form 409 against Héctor López on August 12, 1985 when he failed to report to his assigned position for over a week. Plaintiff explained that the filing of a 409 form was an automatic procedure used to inform the administration of a teacher's failure to report to work. This form was returned to plaintiff by the Director of the Legal Division requesting the submission of three pieces of written evidence that plaintiff communicated with López prior to taking the action. The Legal Division took no further action. On August 14, 1985 Antonio Adrover wrote plaintiff explaining that the defendant had ordered the matter dropped "without effect."

As explained by the Director of the Legal Division the general procedure for terminating a DPI employee is to assign an investigator from the Legal Division's Complaint Department to investigate the employee's conduct. The investigation may be triggered by a complaint filed by a

parent, child, fellow teacher or supervisor. The findings of the investigation are then submitted to the defendant, Secretary of DPI, who decides, with recommendations from the attorneys at the Legal Division, what action should be taken in accordance with Puerto Rico's Law 115.

Once the Secretary decides that discharge is the proper action, the employee is served with a complaint notifying him or her of the termination, the charges, and the right to appeal. If the case is appealed to the DPI Board of Appeals, an attorney from the DPI Legal Division serves as prosecutor in the case.

In plaintiff's case no comprehensive investigation of her conduct was undertaken prior to her first discharge on October 28, 1985. The charges that she kept Clara Luna and José Ramos working in her office when they were assigned elsewhere were supported by findings made by investigators with the DPI Legal Division in the course of investigating a complaint made by parents of children at the José Alegria School. As for the charge concerning Héctor López, Antonie Adrover Robles, a special aide to the defendant, submitted the complaint to the Director of the Legal Division. The Legal Division never investigated this charge. The Director of the Legal Division testified that all credibility findings for the charge were based on conversations she had with Androver and on a statement made by López to Androver. Neither plaintiff nor any other employee in her office was questioned about this charge prior to her termination in October, 1985. Concerning the charge that plaintiff failed to process the teachers' aides, the Legal Division Director must have obtained this information through conversations with Leida Cintrón, the Bayamón Regional Director. The Director never spoke with plaintiff about the matter prior to her termination.

Following plaintiff's reinstatement on November 18, 1985 the Legal Division did some further investigation.

Statements were taken from several sources to establish that Clara Luna and Jóse Ramos were actually in plaintiff's office and to confirm that tension existed between Héctor López and the plaintiff. No statement was ever taken from Clara Luna, Jóse Ramos, the Principals of the schools where they were assigned, or from the plaintiff. This investigation was completed in hand written form on December 9, 1985. On the same day plaintiff was served with the second order of termination signed by the defendant.

FIRST AMENDMENT VIOLATION

The first Amendment protects a government employee from being discharged because of his or her political beliefs or party membership, unless political affiliation is an appropriate requirement for the job. BRANTI v. FINKEL, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). *See* ELROD v. BURNS, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547.[11]

BRANTI and ELROD both presented situations where political affiliation was the sole basis for the dismissal. In such cases where politics is the sole motive for dismissing the plaintiff the courts must apply a strict scrutiny analysis to determine whether the Constitution was violated. *See* WREN v. JONES, 635 F.2d 1277 (1980); FARKAS v. THORNBURGH, 493 F.Supp. 1168 (E.D.Penn. 1980). However, in situations, such as the case at bar, where the evidence demonstrates that political affiliation was not the sole motivating factor, but, rather, the dismissal as based on a "mixture motive" of both legitimate and illegitimate motives, the burden of proof is dictated by MT. HEALTHY CITY SCHOOL DISTRICT BD. OF ED. v. DOYLE, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1974). The ap-

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[11] Defendant admits that political affiliation was not an appropriate requirement for plaintiff "career" position as Superintendent of the Dorado Schools. No claim was ever presented to this Court that plaintiff's dismissal was justified because in her position she was unprotected by the First Amendment.

plication of the MT. HEALTHY standard has been held appropriate in cases where plaintiff claims to have been discharged because of his or her political affiliation and mixed motives are alleged. JONES v. DODSON, 727 F.2d 1329 (4th Cir. 1984); BARNES v. BOSLEY, 745 F.2d 501 (8th Cir. 1984); NEKOLNEY v. PAINTER, 653 F.2d 1164 (7th Cir. 1981); WREN v. JONES, *supra*; TANNER v. McCALL, 625 F.2d 1183 (5th Cir. 1980); ROSALY v. IGNACIO, 593 F.2d 145 (1st Cir. 1979); BRULE v. SOUTHWORTH, 611 F.2d 406 (1st Cir. 1979).[12]

Under the MT. HEALTHY standard the burden is initially on the plaintiff to show that his or her conduct was constitutionally protected and that this conduct was a substantial or motivating factor in the action taken against him or her. *Id.* at 287, 97 S.Ct. at 576; GIVHAN v. WESTERN LINE CONSOL. SCHOOL DIST., 439 U.S. 410,417, 99 S.Ct. 693,697, 58 L.Ed.2d 619 (1979). If this is proven, the burden shifts to defendant to show by a preponderance of the evidence that the plaintiff would have been discharged in any event. *Id.* As the Court explained in GIVHAN, *supra*, if plaintiff is to recover after meeting his or her initial burden, the trier of fact must expressly find that plaintiff would not have been discharged "but for" the constitutionally protected conduct. *Id.* at 417, 99 S.Ct. at 697

The protected conduct in the present case is plaintiff's membership in the NPP political party. Plaintiff's initial burden was to prove that her political affiliation was a substantial and motivating factor for her dismissal. Be-

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[12] We note that defendant made no claim that the action against plaintiff was in response to the March 19 and July 2, 1985 letters plaintiff wrote to the Governor of Puerto Rico. Therefore, we do not consider the facts of this case in light of the balancing test required by *Connick v. Myers*, ___U.S. ___, 103 S.Ct. 1684 (1983); *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1732, 20 L.Ed.2d 811 (1968).

cause of its subjective nature, motivation of a defendant can rarely be proved with direct evidence—seldom will an employer admit to have violated the Constitution. For this reason circumstantial evidence may be used to show discriminatory motive in a patronage dismissal case. GABRIEL v. BENITEZ, 390 F.Supp. 988,993 (D.P.R. 1975), aff'd. RIVERA MORALES v. BENITEZ DE REXACH, 541 F.2d 882 (1st Cir. 1976). We find that the circumstances surrounding plaintiff's dismissal supports her burden of proving political affiliation was a motivating factor for defendant's action.

Plaintiff is a member of the NPP while defendant is a member of the PDP. The Court takes note that in the highly charged political climate in Puerto Rico this fact has added significance. *See, e.g.*, COLON v. CRUV, 84 JTS 52 (P.R. 1984); ROSARIO NEVAREZ v. TORRES GAZTAMBIDE, Civ. No. 85-1117 (citing large number of political discrimination cases filed in the federal court this year alone).

Furthermore, the manner in which defendant handled plaintiff's dismissal indicates that defendant was bent on her discharge. Though one of the functions of the DPI Legal Division, as explained by its Director, is to investigate complaints against an employee to determine whether the complaint has merit, in this case it appears the Legal Division and the defendant were less interested in assessing whether the charges against plaintiff had merit and more interested in building a case to support her dismissal.

Despite the fact that plaintiff was an exemplary DPI employee for 18 years and the Dorado Superintendent for five years, defendant made no comprehensive investigation of plaintiff's conduct prior to her first dismissal on October 28, 1985. The charge that plaintiff failed to assign duties to Héctor López was based solely on a complaint and statements made by López, a well known PDP member,

to Antonio Androver, a special aide to the defendant. The Director of the Legal Division relied on this information from Antonio Adrover to make all credibility findings. Plaintiff was never asked her view of the problem with Héctor López and the DPI Legal Division did no other investigation of the situation.

The charges against plaintiff for keeping Clara Luna and José Ramos in her office were based on otherwise unnoticeable findings made in the course of a much larger investigation of a completely different subject. The investigation report shows that plaintiff explained to the investigator why Clara Luna and José Ramos were working in her office, and that she had received permission from their Principals. Defendant must have rejected this explanation, yet, at no time prior to her dismissal was plaintiff reprimanded for or notified of wrongdoing.

Plaintiff's failure to process the appointment of teachers' aides must have been based on information obtained by the Director of the Legal Division in the course of conversations with plaintiff's supervisor, the Director of the Bayamón Region. Again, plaintiff was never given the opportunity to respond to this charge prior to being dismissed.

It was only after the plaintiff filed suit in this Court and was reinstated as Superintendent that the DPI Legal Division undertook a more comprehensive investigation. However, even this investigation is decisively one-sided. Statements were taken from select individuals only and for the limited purpose of establishing that Clara Luna and José Ramos worked in the plaintiff's office in August and September, 1985, and that plaintiff and Héctor López had a less than friendly relationship. No statement was ever taken from plaintiff, nor from Clara Luna, José Ramos, the Principals of the schools where they were assigned, or from other employees in plaintiff's office who also had a negative relationship with Héctor López.

On December 9, 1985, the very same day that the DPI Legal Division investigator finished her report, and even before the report had been typed, plaintiff was served with her second notice of termination. It is hard to believe that the attorneys at the DPI Legal Division, much less the defendant, had time to review this report before terminating plaintiff.

It also bears weight as an indication that defendant had political motives for terminating plaintiff that no investigation was made of complaints against Héctor López, a PDP member. In particular is the 409 form filed by plaintiff notifying the administration that López had failed to report to his assigned position. The defendant ordered this action dropped without follow-up or investigation.[13]

In addition, the defendant's appointment of Héctor López as Dorado Assistant Superintendent is significant evidence that the defendant does make decision on the basis of political affiliation. Héctor López was appointed despite the fact that there was consensus among the committee members to appoint two other candidates (and no consensus for López), and that it was well known that plaintiff and López had an antagonistic relationship. When asked why she had appointed López despite knowing the facts of the situation, the defendant gave the following unconvincing response:

> [Héctor López] had a right to be appointed. Education is a process of change and supervisors

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[13] Plaintiff also presented letters signed by several teachers working with Héctor López at the Rio Lajas School, where Mr. López was assigned prior to being appointed Assistant Superintendent. The letters complained about López' lack of professional work habits, and his condescending and uncooperative conduct. Although there is no evidence that this complaint was ever sent to the complaint department of the Legal Division, it is clear from the investigating procedures followed in this case that if the Legal Division had been interested in investigating López they would have discovered the complaint and made a follow-up.

> have to change if we want the children to behave and to be considerate, we have to begin to do it by counselors. So I think it was a wonderful opportunity to put professionals together.

The evidence in the record is sufficient to infer that political affiliation was a substantial factor in defendant's motives to terminate her.

The burden shifts to defendant at this point to demonstrate that plaintiff would have been dismissed despite her party affiliation for valid reasons. The applicable test is whether "but for" political discrimination plaintiff would not have been discharged. We find that defendant failed to meet her burden.

We begin with the fact that plaintiff has been a DPI employee for eighteen years and Dorado Superintendent for five years. Until her dismissal on October, 1985, she had never been formally reprimanded for her job performance. In fact, plaintiff was steadily rewarded for her work with job promotions. Even when the charges against plaintiff were taken on their face without considering their merit they do not rise to such a level of seriousness to warrant the *discharge* of an employee of plaintiff's caliber who had been with the DPI for eighteen years. And when the merits are considered it becomes apparent that there is little support for defendant's claim that plaintiff's conduct was insubordinant requiring the termination of her employment with DPI.

Concerning the first charge—that plaintiff failed to process the appointment of the teachers' aides—defendant claims this was an act of insubordination in refusing to carry out the directive of the Bayamón Regional Director, Leida Cintrón. According to defendant plaintiff should have realized the urgency of the situation and made the appointments within "three days." We fail to see how defendant could honestly believe that plaintiff should have realized the urgency of the situation and processed the

aides immediately when it took the Bayamón Regional Director, herself, over six weeks to make the selection—from August 20, 1985 when the committee to select the aides met and no consensus was reached, until October 4 when she sent the plaintiff a letter with her choices for the appointments. Plaintiff claims she received the letter October 11, 1985 and she was dismissed October 28, 1985. This left her less than three weeks to process the appointments. Given the fact that the Regional Director never gave plaintiff a time limit to make the appointments and she never reprimanded plaintiff for tardiness, and given the situation in plaintiff's office—that she was shorthanded and it was the beginning of a school year—all facts of which defendant was aware, we cannot find that defendant was sincere in believing plaintiff's conduct was a purposeful refusal to follow the directives of her supervisor or an overt act of insubordination worthy of dismissal.

Defendant charges that plaintiff's decision to keep Clara Luna and José Ramos working was an act of insubordination in charge of the defendant's May 20, 1985 memo to all Superintendents and the June 29, 1985 memo setting forth the procedure for reassigning DPI personnel. As plaintiff interprets the June 29 amendment, she was authorized to use temporarily the services of Clara Luna and José Ramos. The amendment allows for personnel reassignment when "special circumstances" exist in the district. Plaintiff believed the shortage of personnel in her office to constitute such a "special circumstance." With the permission of the school Principals Clara Luna and José Ramos worked in her office for a short time and then returned to their assignments. There is no evidence that plaintiff's temporary use of Clara Luna or José Ramos caused any disruption in the schools where they worked.

We find plaintiff's interpretation of of the July 29, 1985 amendment to be logical and valid. Certainly it would have been more proper for plaintiff to seek authorization for her action from her supervisor as well as the school Prin-

cipals, however, the July amendment does not call for such authorization. Again, we find a lack of evidence to indicate a purposeful act of insubordination by plaintiff which would warrant a dismissal.

Defendant's charge that plaintiff refused to give Héctor López his proper assignments is the weakest of all charges against her. The tension which existed between plaintiff and López was well known to defendant and many other DIP employees in the Dorado district. If pressed on this issue, the Court would find this charge to favor plaintiff's case over defendant's. It is not an unfounded conclusion that the Secretary, knowing the antagonism between plaintiff and López, appointed López as Assistant Superintendent in order to harass the plaintiff.

We conclude that defendant violated the First Amendment when she discharged plaintiff as Superintendent of the Dorado Schools. Plaintiff's affiliation with the NPP political party was a motivating factor for her discharge and, if it were not for plaintiff's political party affiliation, she would not have been dismissed by defendant.

DUE PROCESS

The Due Process Clause of the Constitution guarantees a public employee with a property interest in continued employment the right to an informal hearing *prior* to being discharged. CLEVELAND BD. OF ED. v. LOUDERMILL, ___U.S. ___ , 105 S.Ct. 1487 (1985). In the Court's view, the protection of a pretermination hearing is required by the Due Process Clause because the private interest of an individual in retaining employment outweighs the government's interest in expeditious removal of an employee and the avoidance of administrative burdens. *Id.*, at 1494. As the Court stated:

> [T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a

> person of the means of livelihood. (Cites omitted.) While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job. (Cite omitted.)

The Due Process Clause guarantees a public employee with a property interest in continued employment the right to notice and an opportunity to respond to the charges at an informal hearing. The type of hearing required is described as "something less than a full evidentiary hearing" enough to make an "initial check against mistaken decisions." *Id.*, at 1495.

In the case before us the plaintiff had a property interest in continued employment as Dorado Superintendent. Puerto Rico's Personnel Act, 3 L.P.R.A. 1349, and Law 115 establish that a "career" employee may be terminated only for "just cause."[14] On October 28, 1985 she was discharged as a Superintendent without notice of the charges against her or an opportunity to respond. Not only was plaintiff left on October 28, 1985 without employment or salary, and was left with the stigma of having been fired from her job with charges against her, but defendant also cancelled all of plaintiff's certificates to teach in both public schools and private schools leaving her without the ability to seek work in the profession she had practiced for the past eighteen years.

After filing this claim against defendant for a due process and First Amendment violation, plaintiff was reinstated as Dorado Superintendent. She was then given an informal hearing before the Director of the DPI Legal Division and two weeks later was discharged for the second time, this time with a cancellation of only her Su-

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[14] Similar state laws have been interpreted to create a property interest worthy of due process protection. *See Loudermill, supra*, at 1491.

perintendent Certificate. Despite this apparent attempt to correct a due process violation, defendant does not concede that plaintiff's due process rights were violated when she was terminated for the first time without a hearing.

Defendant argues that the procedures for discharge required by Law 115 entitling the employee to an expedited decision on appeal—within ninety days—and to full backpay if the Appeals Board decision is favorable, are in compliance with the due process required by LOUDERMILL. This, precisely, is the argument rejected by LOUDERMILL. There, the Supreme Court held that while the State Legislature may confer a property interest on a public employee, it may not constitutionally define the deprivation of the interest. *Id.*, at 1493. Once it is determined a property interest exists according to state law and the due process clause applies, what process is due is determined by the Constitution, not state law. *Id.*

LOUDERMILL held that the Due Process Clause requires a pre-termination hearing before dismissing a public employee, like plaintiff herein, with a property interest in his or her employment. Defendant violated plaintiff's due process rights when she discharged plaintiff on October 28, 1985 without giving plainitff an informal hearing.

RELIEF

Defendant in this case is not entitled to a qualified immunity excepting her from liability for damages. It follows, as a matter of course, that plaintiff is entitled to all relief, for which there is proof, available to a prevailing plaintiff in section 1983 action. Under the proper circumstances a prevailing plaintiff may be awarded injunctive relief in the form of reinstatement to the position previously held. WOOLEY v. MAYNARD, 430 U.S. 705 (1977). As damages, prevailing plaintiff is allowed compensatory damages, WOOD v. STRICKLAND, 420 U.S. 308 (1975); FERNANDEZ v. CHARDON, 681 F.2d 42,60 (1st Cir. 1982), including damages for emotional distress, CAREY v.

PIPHUS, 435 U.S. 247, 263-64 (1978). Plaintiff is also entitled to punitive damages when defendant's conduct involves a callous indifference to plaintiff's federally protected rights or when defendant's conduct is motivated by malicious intent, or evil motive. SMITH v. WADE, 461 U.S. 30 (1982); IRIZARRY v. QUIROS, 722 F.2d 869 (1st Cir. 1983).

As compensatory damages plaintiff is awarded $12,074.50 in back wages. She was dismissed from the position of Superintendent of Dorado on October 28. 1985, nine and a half months ago. Prior to her dismissal she was paid a salary of $1,271.00 per month.

Plaintiff is further awarded $15,000.00 as actual damages for emotional and mental distress. Plaintiff's abrupt discharge from the position as Dorado Superintendent caused her humiliation, stress and anxiety. Plaintiff cried on several occasions during the trial when she was questioned about her discharge on October 28, 1985. Plaintiff tried to seek work elsewhere but was unsuccessful. She testified that the process was extremely painful; that it was difficult for her to maintain composure when she was asked the inevitable question about her past work. Plaintiff no longer goes into the town of Dorado because she is too humiliated and ashamed to face the people she knows and worked with when she held the important position of Dorado Superintendent. Plaintiff is married and the mother of five sons. The family relies on her income for their financial well-being. Plaintiff testified that her dismissal affected her and her family emotionally, socially and financially.

Plaintiff is also awarded $10,000.00 in punitive damages. The evidence indicates that defendant was callously indifferent to plaintiff's federally protected rights and was intent on terminating plaintiff's employment as Superintendent because she was a member of the opposing political party. Though plaintiff was a stellar DPI employee

for eighteen years she was terminated for the first time on October 28, 1986 without her being reprimanded for her conduct, without being notified of the charges, and without being given an oppurtunity to respond.

CONCLUSION

A. DAMAGES

Plaintiff Ipcia Kercadó Meléndez is entitled to recover from defendant Awilda Aponte Roque the amount of $12,074.50 for loss of wages and $15,000.00 for actual damages for emotional and mental distress.

Punitive damages are also assessed against defendant in the amount of $10,000.00 because of her callous disregard for plaintiff's First Amendment rights and to deter political discrimination.

B. INJUNCTIVE RELIEF

Equitable relief is a component of a Section 1983 action. Plaintiff has established that injunctive relief is just and proper in this case. Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED that defendant, her successor in office, agents, attorneys, employees, and any other person acting on behalf or in concert with defendant, reinstate plaintiff forthwith to her former position of Superintendent of the Dorado Schools, at the same salary and with the same fringe benefits she would be earning and receiving, but for her termination, and with the same functions and authority pertaining to her position.

C. ATTORNEYS FEES

As a prevailing party, plaintiff is entitled to attorneys fees pursuant to the Civil Rights Attorney's Fees Award Act, 42 U.S.C. 1988. The overriding purpose of the Act is the encouragement of private enforcement of the civil rights laws to fully vindicate federal constitutional guarantees. Accordingly, plaintiff is to submit a verified fee

application within fifteen days. *See* GRANDEL'S DEN, INC. v. LARKIN, 749 F.2d 945 (1st Cir. 1984).

The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, August 12, 1986.

HECTOR M. LAFFITTE

U.S. District Judge.

APPENDIX C

WALTER VELEZ RAMIREZ Y OTROS, demandantes y apelantes, v. Hon. Carlos Romero Barcelo y Otros, demandados y apelados.

Numeros: R-79-285, 0-79-438 Resueltos: 12 de mayo de 1982

1. DERECHO ADMINISTRATIVO—SEPARATION DE LOS PODERES ADMINISTRATIVOS DE OTROS PODERES—PODERES JUDICIALES—JURISDICCION—AGOTAMIENTO PREVIO DE LOS REMEDIOS ADMINISTRATIVOS.
El balance de poderes que debe existir entre agencias y tribunales, y la necesidad y conveniencia de tener un récord administrativo completo. Aconsejan se culminen los procesos administrativos antes del examen judicial.

2. ID.—ID.—ID.—ID.—ID.
Para decidir si aplica o no el requisito de agotar los remedios administrativos en el contexto de un planteamiento de falta de jurisdicción se deben examinar tres factores: el riesgo de que se ocasione un daño irreparable al afectado si el tribunal pospone su intervención dejando que prosigan los procedimientos, el grado de claridad con que surja la ausencia o presencia de jurisdicción, y la pericia que tenga la agencia para dilucidar las cuestiones pertinentes a su jurisdicción.

3. MUNICIPIOS—CORPORACIONES MUNICIPALES—FUNCIONARIOS Y EMPLEADOS—FUNCIONARIOS MUNICIPALES—DESTITUCION O REMOCION—PROCEDIMIENTOS—REVISION
La garantia estutaria que brinda el Art. 37(i), 21 L.P.R.A. sec. 1256(i), de que todo alcalde a quien, previa formulación de cargos, la Comisión para Ventilar Querellas Municipales resuelva destituirlo tiene derecho a obtener revision judicial directa ante al Tribunal Supremo, minimiza el riesgo de que al alcalde recurrente se le

ocasionen daños irreparables por la posposición del examen judicial de la cuestión jurisdiccional.

4. ID.—ID.—ID.—ID.—ID.—CAUSAS—NEGLIGENCIA INEXCUSABLE EN EL DESEMPENO DEL CARGO.
Si bien la Comisión para Ventilar Querellas Municipales tiene jurisdicción para ventilar los cargos contra un alcalde, el determinar si los cargos radicados imputan "conducta inmoral o actuaciones ilegales que impliquen abandono, negligencia inexcusable o conducta lesiva a los mejores intereses públicos en el el desempeño de sus funciones" está sujeto a un proceso de interpretación y a la consideración de factores que invitan a ser precisados en su origen por la Comisión.
5. ID.—ID.—ID.—ID.—ID.—ID.—ID.
Debido a que la Comisión para Ventilar Querellas Municipales fue creada especificamente para extender en los procedimientos disciplinarios de los alcaldes, ya que presuntivamente está particularmente facultada para determinar lo que "es conducta inmoral or actuaciones ilegales que impliquen abandono, negligencia inexcusable o conducta lesiva a los mejores intereses públicos, en el desempeño de sus funciones", debe ser ella, como organismo especialmente creado para adjudicar las querellas contra los alcaldes, la que intervenga y decida en primera instancia.
6. DERECHO CONSTITUCIONAL—INTERPRETACION, EFECTO Y APLICACION DE PRECEPTOS CONSTITUCIONALES—QUIENES PUEDEN LEVANTAR CUESTIONES CONSTITUCIONALES—EN GENERAL.La impugnaci constitucional de actuaciones administrativas estśujeta a la norma de agotar los remedios administrativos.
7. ID.—ID.—ID.—ID.
Aunque las agencias administrativas no pueden dilucidar la constitucionalidad de la ley que la crea, si pueden determinar si su aplicación a los hechos especificos de un caso seria inconstitucional, y por ello la Comisión para Ventilar Querellas Municipales tendria facultad para

desestimar o declarar sin lugar una querella al estimar que una destitución por motivo de derminada conducta—ya establecida—seria inconstitucional.

8. ID.—ID.—DETERMINACION DE LA CONSTITUCIONALIDAD DE LOS ESTATUTOS—AUTORIDAD Y DEBER DE LOS TRIBUNALES.
El señalamiento de que el derecho al voto protegido por el Art.II, Sec.2 de la Constitución de Puerto Rico no tolera que se prive de su puesto a un alcalde libremente elegido en elección popular, por actos desvinculados con éste, no supera exitosamente la norma de abstención judicial sobre entender en cuestiones constitucionales a menos que sea necesario, ya que no es apropiado explorar esa dimensión hasta que se hayan determinado los hechos y si procede la destitución.

9. ID.—ID.—ID.—ID.
Corresponde a los tribunales y no a la Comisión para Ventilar Querellas Municipales determinar si la suspensión sumaria de un alcalde de su cargo y suelo decretada por el Gobernador viola el debido proceso de ley garantizado en el Art. II, Sec.7 de la Constitución de Puerto Rico y las Enmmiendas V y XIV de la Constitución de Estados Unidos.

10. MUNICIPIOS—CORPORACIONES MUNICIPALES—FUNCIONARIOS Y EMPLEADOS—FUNCIONARIOS MUNICIPALES—DESTITUCION O REMOCION—PROCEDIMIENTOS—CUESTIONES A CONSIDERAR Y RESOLVER.
Al ejercer la facultad constitucionalmente válida que le confiere el Art. 37 de la Ley Municipal para decretar la suspensión de empleo y sueldo de un alcalde luego de haberle sido formulados cargos, hasta que se diluciden los mismos, el Gobernador está limitado a aquellos casos en que la suspensión sea conveniente a los mejores intereses del municipio y a que al hacerlo no viole el debido proceso de ley.

11. DERECHO CONSTITUCIONAL—DEBIDO PROCEDIMIENTO DE LEY—GARANTIAS CONSTITUCIONALES—OPORTUNIDAD DE SER OIDO.
Ya que el debido proceso de ley no requiere que haya una vista previa a toda privación de un derecho o interés propietario, cuando hay una privación temporal basta que en algún momento significativo u oportuno el afectado tenga la oportunidad de defenderse y presentar su caso en un proceso con adecuadas garantias.

12. ID.—ID.—PROPIEDADES Y DERECHOS QUE SE PROTEGEN—PUESTOS PUBLICOS—PUESTOS PUBLICOS COMO DERECHO DE PROPIEDAD.
Los tres factores que deben ser sequidos para examinar cuándo el debido proceso de ley no permite suspender o destituir a una persona de un puesto sin darle derecho a una vista previa son: los intereses afectados por la acción oficial; el riesgo de una determinación errónea que prive a la persona del interés protegido mediante el proceso utilizado y el valor probable de garantias adicionales o distintas; y el interés gubernamental protegido con la acción sumaria, inclusive la función evuelta y las cargas fiscales y administrativas que conllevaria el imponer otras garantias procesales.

13. ID.—ID.—ID.—ID.—ID.
La suspensión sumaria de un alcalde lo priva de sus derechos de propiedad como son el sueldo y beneficios marginales, además de impedirle ejercer el cargo para el cual fue electo, afectándose el ejercicio de la franquicia electoral de los que él votaron, siendo todos los anteriores intereses de gran envergadura e importancia.

14. DERECHO ADMINISTRATIVO—PODERES Y PROCEDIMIENTOS DE FUNCIONARIOS Y AGENTES ADMINISTRATIVOS—VISTA O AUDIENCIA Y ADJUDICACION—EVIDENCIA—SUFICIENCIA.
Cuando existe controversia en cuanto a hechos importantes, éstos no deben ser adjudicados, aunque sea pro-

visionalmente, sin conceder a la persona perjudicada la oportunidad de rebatirlos, sobre todo cuando la evidencia en contra del individuo es de naturaleza testifical, ya que existe el riesgo de que dicha adjudicación se haga en forma errónea.

15. ID.—REVISION JUDICIAL DE DECISIONES ADMINISTRATIVAS—ALCANCE DE LA REVISION—LIMITACION DEL ALCANCE O EXTENSION DE LA REVISION. Toda vez que a la suspensión de empleo y sueldo—siendo un trámite accesorio al procedimiento principal, supeditado a éste y condicionado para ser válido y tener efecto desde su origen a que ocurra una destitución válida, final y firme—le aplica la doctrina de agotar los remedios administrativos, el Poder Judicial debe ceder para que el foro administrativo dilucide y adjudique si un alcalde ha incurrido o no en conducta prohibida por la Ley Municipal, que amerite su destitución.

SENTENCIA de *Peter Ortiz*, J. (San Juan), que deniega una solicitud de *injuction* para restituir a un alcalde y paralizar los procedimientos ante la Comisión para Ventilar Querellas Municipales. *Se confirma la sentencia y se remite el caso a la Comision para Ventilar Querellas Municipales para tramites ulteriores compatible con lo resuleto.*

Hector A. Colon Cruz, Procurador General, Miguel Pagan, Victor Cruz Ojeda y Eunice Sein Llompart del Departamento de Justicia, abogados de los demandados apelados; *Pedro Ortiz Alvarez, Jose L. Lebron Velazquez, Carlos J. Cordova y Sergio Pena Clos*, abogados de los demandantes apelantes.

EL JUEZ ASOCIADO SENOR NEGRON GARCIA emitió la opinión del Tribunal.

El 9 de enero de 1975 Walter Vélez Ramirez, entonces Director de Obras Públicas del Municipio de Lajas, reclamó ante el Fondo del Seguro del Estado por un accidente

sufrido mientras ejercia funciones de su cargo. Alegó que el 6 de enero, al bajar de un *jeep* en un lugar donde se realizaban unas obras de instalación de tuberias en el sector Playa Rosada, resbaló y se lesionó una pierna. El Fondo dio curso a la reclamación y Vélez Ramirez comenzó a recibir tratamiento y los beneficios económicos dispuestos en la Ley.

En noviembre de 1975 Vélez fue nombrado Alcalde de Lajas en sustitución del incumbente que renunció. En las elleciones de 1976 postuló su candidatura por el Partido Popular Democrático. Durante la campaña fue tema y objecto de señalamiento y debate por sus adversarios que la lesión no habia ocurrido en el ejercicio de sus funciones oficiales, sino mientras jugaba béisbol el 6 de enero en el parque José Basora de Lajas. Vélez fue electo alcalde. El 17 de noviembre de 1977, ya siendo alcalde recibió su último cheque del Fondo por la cantidad de $720. En total recibió beneficios en exceso de $1,900.

Posteriormente, el 28 de julio de 1977 el representante José Granados Navedo denunció lo ocurrido mediante carta al Fondo. Acompañó declaraciones juradas de testigos que vieron a Vélez sufrir un accidente durante el mencionado partido de pelota. La agencia inició una investigatilón.

El 20 de abril de 1978 Vélez prestó declaración jurada ante un auditor del Fondo. *Nego haber jugado beisbol el dia 6 de enero.* En el informe a su superior, el funcionario investigador resumió el contenido de las declaraciones ofrecidas por varios testigos entrevistados y concluyó que habia evidencia conflictiva en cuánto o cómo en verdad ocurrió el accidente. Sugirió finalmente que se empleara la investigación y se tomaran las medidas pertinentes en caso de que hubiese sido fraude.

El 2 de junio de 1978 el Director de la Oficina de Auditoria Interna del Fondo sometio su informe a la Administración, señalando que existia evidencia de la posibilidad de que la reclamación de Vélez hubiese sido entablada en

contravención de la Ley. Recomendó: (1) remitir copia del informe al Departamento de Justicia y a la Oficina del Contralor; y (2) de encontrarse que en efecto hubo fraude, proceder con la acción necesaria para recobrar los beneficios concedidos. Siguiendo esas recomendaciones el caso fue referido al Departamento de Justicia. Asi las cosas, el 14 de febrero de 1979 el Gobernador comunicó a Vélez que ese mismo dia habia radicado una querella ante la Comisión para Ventilar Querellas Municipales (C.V.Q.M.), y que efectivo el 15 le suspendió de puesto y sueldo, pendiente a la ventilacion de los cargos. Los dos cargos le imputaban: (1) haber radicado una reclamación falsa ante el Fondo con la intención de defraudar a dicha agencia y apropiarse ilegalmente de fondos públicos, conducta que se inició antes de ser alcalde y prosiguió luego de su elección;[1] y (2) haber cometido perjurio al negar bajo juramento que habia jugado béisbol el dia 6 de enero, en su declaración ante un funcionario investigador[2] del Fondo.

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[1] El 20 de febrero de 1979 se presentó denuncia contra Vélez, G-79-118, en el Tribunal Superior, Sala de Mayagüez por el delito de apropiación ilegal agravada (Art. 166 del Código Penal, 33 L.P.R.A. sec. 4272) y la Sec. 11a de la Ley de Beneficios por Incapacidad (11 L.P.R.A.. sec. 211a). Esta última dispone:

"Cualquier persona que dé una declaración o suministre alguna información sobre algún hecho material a sabiendas de que la misma es falsa o que a sabiendas oculte algún hecho material con intención de cometer fraude para obtener algún beneficio o recibir aumento del mismo bajo este Capitulo, bien para si mismo o para cualquier otra persona, incurrirá en la pena señalada por el Código Penal de Puerto Rico para él hurto de la cantidad de dinero asi obtenida por el o por dicha otra persona; y cada una de dichas declaraciones e informaciones falsas u ocultaciones de hechos materiales constituirán un delito por separado."

Tomamos concocimiento judicial de que el 28 de enero de 1980, en juicio por jurado, Vélez fue declarado inocente del cargo imputado. Regla 11 de Evidencia.

[2] En cuanto a esta imputación no se sometió acusación.

La C.V.Q.M. asumió jurisdicción e inició trámites. El 11 de mayo de 1979 Vélez radicó en el Tribunal Superior "Demanda de Sentencia Declaratoria e *Injunction*" solicitando su restitución y la paralización de los procedimientos ante la Comisión.[3] Celebrada la correspondiente vista, el tribunal a quo desestimó el planteamiento sobre la ausencia de facultad de la Comisión para dilucidar el asunto. El 20 de junio celebró la vista sobre el *injunction* preliminar. En esa misma fecha el recurrente renunció a su cargo de alcalde. Finalmente el tribunal dictó sentencia en que denegó el *injunction* al concluir que la suspensión sumaria no fue arbitraria ni irrazonable.

No conforme, Vélez radicó escrito de apelación y revisión. Acordamos examinar sus planteamientos.

I

El apelante recurrente señala cinco cuestiones de derecho. Tres versan sobre la jurisdicción de la Comisión para juzgarlo y si los cargos que se le imputan constituyen conducta ilegal o inmoral bajo el Art. 37 de la Ley Municipal. Advertimos que cuando Vélez Ramirez acudió al foro judicial, ya habian comenzado los trámites administrativos. El reclamo de intervención judicial a tan temprana etapa nos obliga a considerar si era necesario agotarlos, or si podian ser obviados ante el planteamiento de falta de jurisdicción. Nos inclinamos hacia la primera solución.

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[3] También figuraron como demandantes varios electores que votaron por él en los comicios de 1976 por si y en representación de otros electores en igual capacidad. Aunque nunca se les certificó como representatntes de la clase, continuaron en el pleito en su carácter individual. Como demandados fueron incluidos el señor Gobernador, el Secretario de Justicia y la Comisión para Ventilar Querellas Municipales, a través de sus miembros.

La Ley Municipal[4] en su Art. 37 crea la Comisión para Ventilar Querellas Municipales. 21 L.P.R.A. sec. 1256. Su inciso (a) reza:

> El Gobernador de Puerto Rico, la Asamblea Municipal o cualquier ciudadano, podrá formular cargos al Alcalde por razón de conducta inmoral o actuaciones ilegales que impliquen abandono, negligencia inexcusable o conducta lesiva a los mejores intereses públicos, en el desempeño de sus funciones.

Tanto la doctrina de agotamiento como la de jurisdición primaria cumplen el objetivo de mantener un adecuado balance y distribución de poder y tareas entre las agencias administrativas y el poder judicial. *Febres v. Feijoo,* 106 D.P.R. 676 (1978). La doctrina de jurisdicción primaria pretende determinar si corresponde a una agencia o a un tribunal la intervención *inicial* en una contraversia. En cambio, la de agotamiento se dirige a dilucidar *cuando* es el momento apropiado para que los tribunales intervengan en una controversia previamente sometida a una intervención administrativa. Por tanto, el examinar su posible aplicación surge cuando, habiendo comenzado un procedimiento o actuacion en una agencia, se solicita la intervención ju-

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[4] Ley Num. 142 de 21 de julio de 1960 (21 L.P.R.A. sec. 1105 y ss.). El Art. 37 tiene su origen en la Ley Municipal Núm. 53 del 28 de abril de 1928, Art. 29, según enmendado por las leyes Núms. 98 del 15 de mayo de 1931, 288 del 9 de abril de 1946, 55 del 18 de abril de 1950, y la 4 del 7 de diciembre de 1955.

El pasado año se aprobó la nueva Ley Orgánica para los Municipios, Ley Núm. 146 de 18 de junio de 1980, que entró en vigor el 1 de julio de 1981. En cuanto a las facultades de la Comisión para seguir ventilando los casos pendientes al entrar en vigor su Art. 13.01(c), 21 L.P.R.A. sec. 3501(c), dispuso:

"Cualquier acción civil o criminal radicada en relación a la ley derogada, y en trámite antes de la vigencia de esta ley, se continuará hasta su determinación final bajo las disposiciones vigentes al momento en que se originó la causa de acción o se cometió la violación."

dicial para revisar determinaciones u obtener un remedio judicial, antes de que se haya culminado todo el trámite o procedimiento administrativo establecido. *Quinones v. A.C.A.A.*, 102 D.P.R. 746 (1974), *y E.L.A. v. 12,974.78 Metros Cuadrados*, 90 D.P.R. 506 (1964).

[1] La decisión de requerir o no el agotamiento no depende de criterios rigidos u objectivos, sino de si a la luz de las circunstancias del caso y pericia particular de la agencia, se entiende que la intervención judicial seria prematura. El balance de poderes que debe existir entre agencias y tribunales, y la necesidad y conveniencia de tener un récord administrativo completo, aconsejan que se culminen los procesos administrativos antes del examen judicial. Davis, *Administrative Law Treatise*, St. Paul, Minnesota, West Publishing Co., 1958, Vol. 3, Secs. 19.01 y 20.01; y Davis, *Administrative Law of the Seventies*, Rochester, New York, Lawyer's Co—operative Co., 1976, Sec.20.01.

[2] No obstante, existen situaciones en que no es necesario agotar dichos remedios. *Vda. de Iturrequi v. E.L.A.*, 99 D.P.R. 488, 491-92 (1970); *Quinones v. A.C.A.A.*, supra; *Lopez de Victoria v. Soler Favale*, 101 D.P.R. 710 (1973). Una instancia que tipicamente plantea el problema es cuando se cuestiona ante el tribunal la falta de jurisdicción de la agencia sobre el asunto que está bajo su consideración. Davis, *Administrative Law Treatise*, supra, Vol. 3, Sec. 20.02. Según el profesor Davis los tribunales, y en particular el Tribunal Supremo de Estados Unidos, no han sido consistentes al evaluar el problema y no han delimitado claramente cuándo procede o no su examen. Aún asi la jurisprudencia propone que se aprecien tres factores:[5]

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[5] Estos tres factores se han seguido en *State of Cal. ex rel. Christensen v. F.T.C.*, 549 F.2d 1321 (9th Cir. 1977), *cert.* den. 434 U.S. 876 (1977); *Casey v. F.T.C.*, 578 F.2d 793, 796 (9th Cir. 1978); *Marshall v. Able Contractors, Inc.* 573 F.2d 1055, 1057 (9th Cir. 1978), *cert.* den. 439 U.S. 826 (1978); *Lone Star Cement Corporation v. F.T.C.*, 339 F.2d

(1) el riesgo de que se ocasione un daño irreparable al afectado si el tribunal pospone su intervención dejando que prosigan los procedimientos, (2) el grado de claridad con que surja la ausencia o presencia de jurisdicción, y (3) la pericia que tenga la agencia para dilucidar las cuestiones pertinentes a su jurisdicción. Davis. *Administrative Law Treatise,* supra, Vol. 3, Sec. 20.03, pág. 69.

Estos criterios resumen adecuadamente las consideraciones a tomarse en cuenta para decidir si aplica o no el requisito de agotamiento en el contexto de un planteamiento de falta de jurisdicción. Su utilización facilita decidir conforme a los propósitos y objectivos de la doctrina. Veamos su aplicación al caso de autos.

A. Riesgo de dano irreparable si el tribunal pospone su intervencion:

[3] La garantia estatutaria que brinda el Art. 37(i), 21 L.P.R.A. sec. 1256(i), de que todo alcalde a quien, previa formulación de cargos, la Comisión resuelva destituirlo, tiene derecho a obtener revisión judicial directa ante este Tribunal,[6] minimiza el riesgo de que al recurrente se le ocasionen daños irreparables por la posposición de examen judicial de la cuestión jurisdiccional.

En primer término, en mayor or menor grado los costos económicos y sociales del procedimiento administrativo son un riesgo inherente en este tipo de proceso, prospere o no la defensa de falta de jurisdicción. El requerir su agotamiento no depende de la inversión en si, sino de la prob-

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505 (9th Cir. 1964); *United States v. Rockland Steamship Corporation,* 218 F.Supp. 509, 513 (1963); *Oil Shale Corporation v. Udall,* 235 F.Supp. 606 (1964); *Campbell Sixty—Six Express, Inc. v. J. & G. Express, Inc.,* 244 Miss. 427, 141 So.2d 720 (1962); *Willamette Valley Lumber Co. v. Ellis,* 226 Or. 543, 359 P.2d 98 (1961).

[6] Aunque los electores recurrentes no tienen un derecho a solicitar revisión de la decisión de la Comisión, nada impediria que radicaran una acción como la presente y reprodujeran los planteamientos pertinentes cuando se emita dicha decisión.

abilidad de que la misma sea en vano porque, en efecto, la agencia carece de jurisdicción. Esto a su vez depende de la *claridad* con que surja la cuestión jurisdiccional en esa etapa de los procedimientos.

En segundo lugar, el peligro de que el simple transcurso del tiempo y el someterse al proceso vayan a perjudicarle indebidamente es minimo. Aunque se nos argumenta que los procedimientos ante la Comisión suelen ser lentos, no se ha demostrado que no puedan aligerarse o que ello de por si ocasione algún perjuicio particular. No existen indicios de que vayan a disminuir las oportunidades de reproducirse el planteamiento jurisdiccional en su oportunidad. Tampoco hay evidencia de que Vélez Ramirez tenga que mantenerse sometido al proceso de destitución hasta su culminación. Los hechos han demostrado que los efectos de la querella sobre su carrera politica son minimos.[7]

B. El grado de claridad sobre ausencia o presencia de jurisdiccion:

La doctrina acepta que cuando surge claramente que no hay jurisdicción, ningún beneficio se obtiene obligando al litigante a mantenerse en la agencia hasta culminar el proceso. No es entonces necesario consumir los remedios. Davis, *Administrative Law Treatise,* supra, Vol. 3, Sec. 20.01. Requerirlo en esas circunstancias seria una futilidad en términos de tiempo y dinero, porque finalmente el foro judicial, con toda probabilidad, invalidaria el proceso. Asi, en la medida que la cuestión jurisdiccional es menos clara y disminuyen estos riesgos, es adecuado compeler a que se agoten dichos remedios. Robustece este enfoque que en esa etapa el tribunal tiene a su disposición el récord y beneficio de la adjudicación final efectuada por la agencia, que es el entidad especializada en el asunto.

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[7] Tomamos conocimiento judicial de que Vélez Ramirez fue electo nuevamente alcalde en las elecciones genrales del 1980, cargo que actualmente ocupa.

En el caso de autos, estamos ante un estatuto creado especificamente para ventilar y adjudicar cargos contra los alcaldes. Esa encomienda es clara y su ámbito definido. La ausencia de jurisdicción no es evidente. Por el contrario, depende de precisar y dirimir unos hechos no adjudicados hasta el momento. El determinar si los cargos radicados imputan "conducta inmoral o actuaciones ilegales que impliquen abandono, negligencia inexcusable o conducta lesiva a los mejores intereses públicos, en el desempeño de sus funciones", es uno asunto que está sujeto al proceso de interpretación. Cuán restrictivamente o amplio deben ser interpretados estos términos? Son la conducta y actuaciones imputadas inmorales? Son ilegales? Implican abandono, negligencia inexcusable o conducta lesiva a los mejores intereses públicos? La frase "en el desempeño de sus funciones" según usada en el Art. 37, comprende actuaciones necesariamente ocurridas durante el tiempo que se ejerce el cargo o aquellas cometidas antes de ocupar la posición de alcalde, pero con efectos posteriores? Además, Vélez Ramirez aduce que la Comisión no puede tener jurisdicción en este caso porque (1) corresponde al Fondo hacer la determinación de compensabilidad de un accidente del trabajo, de acuerdo al espiritu de liberalidad que anima a la Ley, y sujeto al derecho del obrero de obtener revisión en la Comisión Industrial y el Tribunal Supremo; y (2) que el Fondo determinó que el querellado recurrente tenia derecho a recibir compensación y no ha revocado esa determinación, la cual constituye cosa juzgada.

[4] La interrogantes planteadas y demás señalamientos nos mueven a concluir que si bien la Comisión tiene jurisdicción para ventilar los cargos contra Vélez Ramirez, no está meridianamente claro el ámbito de su facultad en las circunstancias singulares del caso. Hay una variedad de factores a considerar en relación con la cuestión, que aconsejan sean precisados en su origen por la Comisión.[8]

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[8] Vélez radicó ante la Comisión una "Moción de desestimación" en

C. La pericia de la agencia para dilucidar las cuestiones pertinentes a su jurisdiccion:

[5] La Comisión fue creada especificamente para entender en los procedimientos disciplinarios de los alcaldes. *Rodriguez Rivera, Alcalde v. Comision,* 84 D.P.R. 68 (1961). Presuntivamente está particularmente facultada para determinar lo que es "conducta inmoral o actuaciones ilegales que impliquen abandono, negligencia inexcusable o conducta lesiva a los mejores intereses públicos, en el desempeño de sus funciones". El dictamen de si existe o no jurisdicción dependerá en gran medida del ejercicio de su pericia administrativa. *McKart v. United States,* 395 U.S. 185, 193-94 (1969); *Myers v. Bethlehem Corp.,* 303 U.S. 41 (1938).

Aunque podria argumentarse que el caso envuelve una interpretación estatutaria—función por excelencia de los tribunales—lo cierto es que en la medida en que la Comisión interprete dicha disposición, afectará su jurisdicción. Por consiguiente, debe ser ella, como organismo especialmente creado para adjudicar las querellas contra los alcaldes, la que intervenga y decida en primera instancia.

En sintesis, no están presentes las condiciones necesarias que excuasan agotar el remedio administratrivo ante un reclamo de falta de jurisdicción. Hasta lo posible—velando desde luego la protección de los intereses en juego—hemos de mantener un adecuado balance entre los poderes de las agencias y los tribunales, evitando una prematuraa intromisión. *Myers v. Bethlehem Corp.,* supra; *United States v. Utah Const. and Mining Co.,* 384 U.S. 394 (1966). Después de todo, la norma de preferir el agotamiento de la acción administrativa es una conveniencia compatible con

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la que hizo sustancialmente los plateamimentos sobre jurisdicción luego reproducidos ante el Tribunal Superior y este foro. Dicha moción no habia sido resuelta cuando radicó su demanda, ni cuando se perfeccionaron los presentes recursos. No contamos con el beneficio de una opinión y discussión de la C.V.Q.M.

la justicia, que no margina el escrutinio final por los tribunales. *Febres v. Feijoo,* supra, págs. 681-82; *Gonzales Saldana v. Tribunal superior,* 92 D.P.R. 477, 487 (1965).

II

El recurrente nos señala que el derecho al voto, protegido por el Art. II, Sec. 2 de la Constitución de Puerto Rico, no tolera que se prive a un alcalde de su puesto libremente elegido en elección popular, por actos desvinculados de éste. No podemos evaluar en sus méritos esta conclusion.

[6-7] Primero, la impugnación constitucional de actuaciones administrativas está sujeta a la norma del agotamiento de los remedios administrativos. *DuBois Clubs v. Clark,* 389 U.S. 309 (1967). Aunque las agencias administrativas no pueden dilucidar la constitucionalidad de la ley que las crea, si pueden determinar si su aplicación a los hechos especificos de un caso seria inconstitucional. Davis, *Administrative Law Treatise,* supra, Vol. 3, Sec. 20.04, pág. 74. En principio, la Comisión, por consiguiente, tendria facultad para desestimar o declarar sin lugar una querella al estimar que una destitución por motivo de determinada conducta—ya establecida—seria inconstitucional.

[8] Segundo, el señalamiento no supera exitosamente la norma de abstención judicial sobre entender en cuestiones constitucionales a menos que sea necesario. *Galarza Soto v. E.L.A.,* 109 D.P.R. 179, 180, escolio 1 (1979); *E.L.A. v. Aguayo,* 80 D.P.R. 552, 596 (1958). No esta apropiado explorar esa dimensión hasta que se hayan determinado los hechos y si procede la destitución. Esa tarea exige un balance de los intereses en pugna y precisa conocer todos los pormenores y circunstancias que rodean la conducta de Vélez Ramirez. Rechazamos resolver la cuestión en el abstracto, o en ausencia de un récord administrativo completo. Máxime en casos como el de autos, en que su adjudicación requiere el ejercicio de discreción administrativa para di-

rimir credibilidad de testigos. Davis, *Administrative Law Treatise,* supra, Vol. 3, Sec. 20.01, págs. 642-43 (Supl. 1970); *McKart v. United States,* supra, págs. 193-94. Por último, no estamos tampoco ante un reclamo de un remedio que la agencia no pueda conceder.

En atención a los fundamentos expuestos, concluimos que no erró la ilustrada sala sentenciadora al negarse a conceder el remedio declarativo e *injunction.*

III

[9] Finalmente concentremos nuestra atención en analizar la contención de si la suspensión sumaria del cargo y empleo decretada por el Gobernador violó el debido proceso de ley garantizado en el Art. II, Sec. 7 de la Constitución de Puerto Rico y la Enmiendas V y XIV de la Constitución de Estados Unidos.

Distinto al enfoque anterior, para atender el señalamiento no es menester que haya mediado una adjudicación previa por la Comisión, pues el asunto gira sobre la decisión del Primer Ejecutivo al momento de formular los cargos, actuación que hace a la luz del expediente investigativo y demás constancias que en ese momento posee. La suspensión de empleo y sueldo tiene unos efectos negativos immediatos sobre el funcionario y son de tal naturaleza que excluyen la apreciación de la norma de abstención. Corresponde, pues, a los tribunales y no a la Comisión el determinar si la suspensión sumaria al ampara de la Constitución viola o no el debido proceso de ley. Veamos

[10] El Art. 37(j) vigente para la fecha de los cargos disponia:

> Al tiempo de formular los cargos contra el Alcalde o en cualquier momento posterior, *si a su juicio asi conviene a los intereses del municipio,* el Gobernador podrá decretar la suspensión de empleo y sueldo del

> Alcalde hasta que el caso sea resuelto en difinitiva. (Enfasis suplido.) 21 L.P.R.A. sec. 1256(j).

El texto legal transcrito claramente autoriza al Gobernador a decretar la suspensión de empleo y sueldo de un alcalde, luego de habérsele formulado cargos, hasta que se diluciden los mismos. Esta facultad es constitucionalmente válida. *Fugate v. Weston,* 157 S.E. 736 (1931); McQuillin, *Municipal Corporation,* 3ra ed., 1979 Vol. 4, Secs. 12.229 a 12.231. Ello no significa que el poder del Gobernador sea absoluto e ilimitado. Ninguno lo es en nuestro ordenamiento juridico. *Warner Lambert Co. v. Tribunal Superior,* 101 D.P.R. 378 (1973); *Santa Aponte v. Srio. del Senado,* 105 D.P.R. 750, 764 (1977). El mismo lenguaje de ley limita al Gobernador su facultad de suspensión a aquellos casos en que ésta es conveniente para los mejores intereses del municipio. Al ejercer entonces ese poder no puede violentar el debido proceso de ley.

[11] Hemos resuelto que el debido proceso de ley no requiere que haya una vista previa a toda privación de un derecho o interés propietario. Cuando hay una privación temporal basta que en algún momento significativo u oportuno el afectado tenga la oportunidad de defenderse y presentar su caso en un proceso con adecuadas garantias. Se reconoce que hay ocasiones en que el Estado tiene algún interés de importancia que exige la intervención temporal con la propiedad o libertad de una persona antes de que pueda brindársele la oportunidad de ser oido. La doctrina informa que para determinar si el tipo de vista concedida y el momento en que se brinda son constitucionalmente aceptables, hay que analizar conjuntamente los intereses gubernamentales y los de la persona afectada. *Rodriguez v. Tribunal Superior,* 104 D.P.R. 335 (1975); *Dominguez Talavera v. Tribunal Superior,* 102 D.P.R. 423 (1974); *Mathews v. Eldridge,* 424 U.S. 319 (1976); *Arnett v. Kennedy,* 416 U.S. 134 (1974); Davis, *Administrative Law Treatise,* 2da ed., San Diego, K.C.

Davis Pub. Co., 1979, Vol. 2, Secs. 11:12 y 12:14, págs. 388-95 y 462-63.

[12] *Mathews v. Eldridge,* supra, articuló tres factores a ser seguidos para examinar cuándo el debido proceso de ley no permite suspender o destituir a una persona de un puesto sin darle derecho a una vista previa. Davis, *Administrative Law Treatise,* 2da ed., supra, Vol. 2, Sec. 13:12, págs. 509-12; Lawrence H. Tribe, *American Constitutional Law,* New York, The Foundation Press, 1978, pág. 540; H. Friendly, *Some Kind of Hearing,* 123 U.Pa.L.Rev. 1267 (1975). Los factores son: (1) los intereses afectados por la acción oficial; (2) el riesgo de una determinación errónea que prive a la persona del interés protegido mediante el proceso utilizado y el valor probable de garantias adicionales o distintas; y (3) el interés gubernamental protegido con la acción sumaria, inclusive la función de que se trata y las cargas fiscales y administrativas que conllevarian el imponer otras garantias procesales. Examinamos estos factores.

A. Los intereses afectados por la accion de suspension:

[13] La suspensión sumaria privió al recurrente de sus derechos de propiedad como lo son el sueldo y beneficios marginales, además de ejercer el cargo para el cual fue electo en las elecciones generales de 1976. *Paul v. Davis,* 424 U.S. 693 (1976); *Fuentes v. Shevin,* 407 U.S. 67 (1972). Estos, desde luego, no fueron los únicos danos envueltos. Adviértase que se trata de un funcionario seleccionado en elecciones generales, que recibió la confianza de los electores del Municipio de Lajas luego de que las actuaciones imputadas en los cargos fueran ampliamente debatidas en el foro politico. *Robledo, Alcalde v. C.V.Q.M.,* 95 D.P.R. 1, 13 (1967).

Nuestra Constitución en su Art. II, Sec. 2 garantiza el derecho al sufragio universal, igual, directo y secreto. Protege además al ciudadano contra toda coacción en el ejercicio de la prerrogativa electoral. El derecho al voto en

todas sus manifestaciones representa el corazon de un gobierno democrático. *Ortiz Anglero v. Barreto Perez,* 110 D.P.R. 84 (1980); *P.S.P., P.P.D., P.I.P v. Romero Barcelo,* 110 D.P.R. 248 (1980); *P.P.D. v. Admor. Gen. de Elecciones,* 111 D.P.R. 199 (1981); *P.P.D. v. Barreto Perez,* 110 D.P.R. 376 (1980); *P.S.P. v. Com. Estatal de Elecciones,* 110 D.P.R. 400 (1980). Esas garantias conllevan que en última instancia el voto individual tenga realmente un valor y eficacia en la selección de determinados candidatos a puestos públicos, que se configura al sumarse con la voluntad de otros ciudadanos.

Los comicios de 1976 demostraron que la voluntad de la ciudadania fue que Vélez Ramirez dirigiera los destinos del municipio por los próximos cuatro años. Este, por consiguiente, tenia la obligación de acatar ese mandato. Su suspención sumaria le impidió cumplir con esa obligación. Afectó el ejercicio de la franquicia electoral y privó de sus servicios como alcalde a los que por él votaron. Indudablemente que los intereses afectados por la destitución sumaria son de gran envergadura e importancia. El hecho de que fuera sustituido por otra persona de su mismo partido no milita en contra, pues ello no subsana sus derechos personales afectados y tampoco libera de perjuicio el derecho al voto. Mientras más fuerte sea el interés individual afectado y mayor respaldo social y constitucional tenga, el debido proceso de ley se torna más exigente. *Addington v. Texas,* 441 U.S. 418 (1979).

Las consideraciones expuestas deben estimarse en el contexto del planteamiento en cuando a la destitución sumaria. No implica que estamos adelantando nuestro criterio sobre cuál debe ser el desenlace final, de probarse los cargos. Tampoco representa que estamos adelantando juicio alguno sobre la aplicabilidad al caso de la doctrina jurisprudencial adoptada en *Winship, Gobernador v. Asamblea Mpal.,* 53 D.P.R. 138, 147 (1938), que, citando de *State v. Welsh,* 79 N.W. 369 (1899), rechaza la tesis de absolución por hechos cometidos e imputados en una ad-

ministración pasada a base de que el electorado reeligió al funcionario, pues:

> "el objecto principal de una remoción es librar a la comunidad de un funcionario corrupto, incapacitado e indigno de confianza. Sus actuaciones durante su mandato anterior revelan tan eficazmente que puede calificársele de tal, lo mismo que las del término en que está sirviendo. La reelección no condona el delito. La conducta ofensiva puede que no haya sido descubierta con anterioridad a su elección, y, sea ello como fuere, no habia sido establecida en la forma prevista por el estatuto."

B. El Riesgo de una suspension erronea:

La función revisora judicial no puede limitarse a determinar si la decisión del Gobernador de suspender sumariamente de empleo y sueldo a un alcalde conviene a los intereses del municipio, considerando únicamente una evaluación de los cargos imputados y tomándolos como ciertos. Ese enfoque restrictivo representaria un criterio inaceptable, pues prácticamente convertiria al Gobernador en árbitro absoluto y único de los destinos municipales, privando a los perjudicados del derecho de acudir a los tribunales para impugnar esa actuación.

En esa tarea el Poder Judicial debe evaluar el cuadro integral que tuvo a su disposición el Gobernador al momento de adoptar su decisión. Veamos los factores presentes a la fecha de su suspensión: (1) el recurrente habia actuado como alcalde por aproximadamente treinta y nueve (39) meses luego de su reclamación al Fondo; (2) los hechos que motivaron los cargos era un suceso conocido en los circulos politicos desde muy temprano; (3) el periodo que transcurrió entre la reclamación y la radicación de los cargos fue extenso; (4) el Contralor habia intervenido con tres años de la administración de Vélez Ramirez y no habia encontrado irregularidad alguna en el manejo de los fondos públicos; y (5) todos los informes que fueron rendidos en

cuanto a la investigación que precedió a la formulación de los cargos y la suspensión, por los investigadores del Fondo y del Departameto de Justicia, demostraban que la evidencia—consistente de diferentes declaraciones juradas—era conflictiva en cuanto a cómo en verdad habia ocurrido el accidente.

A poco que reflexionamos nos convencemos de que estos factores presentan una seria y verdadera controversia en cuanto al resultado final de los hechos imputados. Generalmente se reconoce que cuando existe controversia en cuanto a los hechos importantes, éstos *no* deben ser adjudicados, aunque sea provisionalmente, sin concederse a la persona perjudicada la oportunidad de rebatirlos. La situación es más importante cuando la evidencia en contra del individuo, como la de autos, es de naturaleza testifical. *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Greene v. McElroy,* 360 U.S. 474, 496-97 (1959); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.,* 439 U.S. 96 (1978).

[14] Ante este cuadro fáctico opera la decisión del Gobernador de suspenderlo. Era tal curso de acción conveniente para los mejores intereses del municipio? Ciertamente existia controversia sobre la veracidad de los hechos en pugna. De igual modo el inventario preliminar del total de las circunstancias descritas no es del todo claro. Es razonable, pues, concluir que el momento de la suspensión existia riesgo de que ésta se hiciera en forma errónea.[9]

C. El interes gobernamental protegido con la destitucion y suspension sumaria:

En *Robledo,* supra, reconocimos los intereses tutelados cuya protección se le encomienda a la Comisión salvaguardar al optar por destituir un alcalde:

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[9] Los casos de *Levesque v. State of Me.,* 587 F.2d 78 (1978); *Arnett v. Kennedy,* supra; y *Comisionado de Seguros v. Tribunal Superior,* 100 D.P.R. 546 (1972), citados por el tribunal de instancia son en sus hechos muy destintos y distriguibles al de autos.

> La forma en que está redactado el estatuto sugiere que el criterio rector para la destitución no participa de naturaleza punitiva para el incumbente sino que responde al propósito de evitar lesiones al interés público. La medida debe propender al mejoramiento del servicio público, y por tanto debe tratarse de conducta detrimental para la disciplina y eficiencia de la función pública. . . . la actuación del querellado [tiene que haber] afectado en forma sustancial e irremediable el funcionamiento del régimen municipal. Pág. 13.

En igual sentido en *Diaz v. Charneco*, 48 D.P.R. 536, 540 (1935), citando de *Words & Phrases Judicially Defined*, dijimos que la causa el "legal y no cualquier causa que la asamblea pueda considerar suficiente. La causa debe ser una que se relacione especialmente y que afecte la administración del cargo y debe limitarse a algo de naturaleza substancial y que afecte directamente los derechos e intereses del pueblo. La causa debe tener intima relación con la idoneidad del funcionario o con el desempeño de sus deberes, demostrative de que él no es una persona apropiada para el cargo".

En resumen, la destitución pretende proteger al municipio contra una administración de los fondos y bienes públicos fraudulenta, corrupta e irresponsable y del abuso de los poderes inherentes al cargo del alcalde. Como corolario lógico, iguales fines persigue una suspensión summaria del Gobernador.

Se advierte, sin embargo, una diferencia en cuanto a la destitución por la Comisión y la suspensión por el Gobernador. En la primera, el Art. 37(d) requiere vista previa y en la otra no, aunque tampoco se obliga al Gobernador a suspender a los alcaldes inmediatamente después de radicar los cargos, sino que lo faculta para hacerlo en ese momento o en cualquiera otro posterior. Si no lo suspende inmediatamente puede hacerlo después.

La jurisprudencia reconoce una serie de situaciones donde el interés protegido es de tal intensidad y naturaleza que es innecesaria una vista previa: la confiscación y destrucción de alimentos inadecuados para el consumo humano, *North American Storage Co. v. Chicago,* 211 U.S. 306 (1908); el hacerse cargo de una sucursal bancaria cuando su operación es ilegal y no es segura por ser la gerencia inadecuada, siendo la situación capaz de causar daño a los acreedores y al público, *Fahey v. Mallonee,* 332 U.S. 245, 253 (1947); la incautación de mercancia con etiquetas engañosas, *Ewing v. Mytinger & Casselberry,* 399 U.S. 594, 599 (1950); la determinación de causa probable para arrestar, *Gerstein v. Pugh,* 420 U.S. 103 (1975; el embargo de una cuenta bancaria, *North Georgia Finishing, Inc. v. DIChen, Inc.,* 419 U.S. 601 (1975); la confiscación de un barco con evidencia delictiva, *Calero—Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974); la terminación de los beneficios por incapacidad bajo la ley de seguro social, *Mathews v. Eldridge,* supra.

En contrario, existen instancias en que la vista previa es necesaria. Asi por ejemplo: el retirar beneficios a familias con dependientes cuando quedan en total indefensión económica, *Goldberg v. Kelly,* supra; cuando se va a embargar una porción del salario, *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969); la confiscanción por litigantes privados sin la participación cabal de un juez, *Fuentes v. Shevin,* supra; *Mitchell v. W.T. Grant Co.,* 416 U.S. 600 (1974).

Esa jurisprudencia nos permite detectar la idea primordial detrás del criterio que justifica las actuaciones sumarias sin la previa celebración de vista, a saber, la existencia de una urgencia suficientemente fuerte, capaz de pasar sobre los derechos de una parte y permitir una pérdida temporal de los mismos. Los intereses encontrados deben ser balanceados. Davis, *Administrative Law Treatise,* supra, 2da ed., Vol. 2, Sec. 11:12, pág. 391. Al pesar los criterios en disputa en búsqueda de ese balance, debe

considerarse la función envuelta, las cargas fiscales y administrativas, y las garantias anteriores y posteriores que se le conceden a la parte afectada con la suspensión sumaria. Entre los posteriores, es de singular importancia si existe el derecho a una vista rápida donde se diluciden los cargos o actuaciones imputadas. *Mitchell v. W.T. Grant Co.*, supra, pág. 607; *Goss v. Lopez*, 419 U.S. 565 (1975); *Barry v. Barchi*, 443 U.S. 55 (1979).

Con referencia al estatuto ante nos, notamos como garantias anteriores a la suspensión que el Art. 37 requiere la formulación de cargos ante la Comisión. Además, la evidencia que tenga el Gobernador ante si debe ser suficiente, capaz de demostrar que a su juicio tal proceder conviene a los mejores intereses del municipio. Regla 9 de Evidencia; Art. 37(e).[10] Desde luego, ello no quiere decir que el juicio debe ser exclusivo del Ejecutivo de turno. Sino que debe ser representativo de una persona prudente y razoanable, que ante evidencia suficiente pueda concluir que el alcalde debe ser suspendido por resultar beneficioso a los mejores intereses del municipio.

Una vez adoptado ese curso de acción sin celebración previa de vista, las garantias posteriores son de vital importancia. El Art. 37 reconoce cuatro fundamentales. *Primera,* notificación de los cargos imputados. *Segunda,* el derecho a contestarlos por escrito dentro de 10 dias y la oportunidad para comparecer y defenderse por si o por medio de abogados. *Tercera,* facultad de la Comisión para pasar juicio sobre la suspensión sumaria antes de entrar a examinar en su fondo los cargos. Aunque de la faz del Art. 37 no se desprende expresamente que la Comisión

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[10] Para la Comisión, como la destitución es permanente, la evidencia debe ser clara: Antieau,*Municipal Corporation Law,* New York, Matthew Bender, 1979, Vol. 2A, Sec. 22.163, pág. 22-245; *De Castro v. Junta de Comisionados,*57 D.P.R. 153, 163 (1940). Ademas las actuación tiene que haber "afectado en forma sustancial e irremediable el funcionamiento del régimen municipal".*Robledo,*Supra, pág. 13.

tenga esa facultad, en estricta interpretación judicial hay que admitir que implicitamente la tiene. Dos razones asi lo demuestran, a saber: (1) el Art. 37(d) faculta a la Comisión para—si estimare que los cargos son frivolos e insuficientes o de su faz resultare que no conllevan conducta inmoral o actuaciones ilegales que impliquen abandono, negligencia inexcusable o conducta lesiva a los mejores intereses públicos en el desempeño de sus funciones—desestimar los cargos *sin celebracion de vista;* y (2) si la Comisión, al momento de evaluar el pliego de cargos o en cualquier momento posterior determina que aun considerando los cargos imputados como ciertos, éstos representan una actuación ilegal de carácter leve—lo cual según el inciso (e) del Art. 37 no permite la destitución de un alcalde—se hace innecesario mantener la suspensión sumaria y debe ordenar que se deje sin efecto y disponer la restitución con todos los beneficios como si nunca se hubiese suspendido y continuar con los procedimientos. Y *cuarta,* en la vista se debe llevar un récord de todo lo sucedido.

La jurisprudencia ha refrendado la validez de trámites análogos al expuesto. Asi, en *Dominguez Talavera v. Tribunal Superior,* 102 D.P.R. 423 (1974), sostuvimos la validez de un embargo sin vista previa autorizado por el Art. 6 de la Ley de Ventas Condicionales, 10 L.P.R.A. sec. 36, y la Regla 56 de las de Procedimiento Civil de 1958, debido a las garantias presentes, anteriores y posteriores a un embargo, tales como (1) la participación judicial; (2) la prestación de fianza por la parte embargante; (3) la facultad de levantar el embargo; y (4) el derecho del deudor a una vista rápida para cuestionar el embargo.

En el caso de autos la decisión en juego es de igual carácter. La única diferencia detectable es la forma en que se evalúa unilateralmente y en forma *ex parte* la evidencia a disposición del Gobernador. En ciertas instancias ellos podria tornar en efimero el requisito de la "evidencia suficiente", lo que produciria que la suspensión sumaria—en comparación con la envergadura de los cargos imputados—

fuera irrazonable. Ello impone a los tribunales una obligación especial al revisar decisiones de este indole. *Cf.* Davis, *Discretionary Justice,* Baton Rouge, La. State Univ. Press, 1969; *Hernandez Denton v. Quinones Desdier,* 102 D.P.R. 218 (1974).

IV

Al retrotraernos al momento de la suspensión y aplicar balanceadamente los tres factores antes enunciados y evaluados, surgen en nuestro ánimo serias reservas sobre si la suspensión del recurrente fue razonable y procedia. Primeramente, hemos visto que los derechos afectados eran de gran envergadura e importancia. Segundo, el cuadro total de las circunstancias que tuvo ante si el Gobernador al suspenderlo no era totalmente claro. Existia un gran riesgo de que la base probatoria de la investigación—de carácter testifical y conflictiva—lo llevara a actuar en forma errónea. Tercero, el mantener al recurrente en su puesto no representaba ninguna carga fiscal ni administrativa para le Municipio de Lajas ni para el Gobierno de Puerto Rico. Este llevaba trabajando satisfactoriamente, *segun el Contralor,* tres años. Cuarto, habia transcurrido un periodo extenso entre la acción ilegal imputada y la radicación de los cargos. Estaba revestida entonces de tal urgencia la suspensión que no admitiera esperar a que la Comisión hiciera la determinación inicial de si los cargos eran frivolos e insuficientes o no, o si se trataba de una actuación ilegal de carácter leve que no ameritara tal sanción?

[15] No es necesario contestar ahora estas interrogantes. Los autos reflejan que el recurrente renunció a su puesto el 20 de junio de 1979, esto es, cuatro (4) meses y cinco (5) dias después de su suspensión. Esa conducta resulta totalmente incompatible con el reclamo de un remedio urgente en sus dimensiones procesal y sustantiva. El periodo eleccionario por el cual fue suspendido expiró. Fue electo nuevamente para este cuatrienio. Como parte de este pleito judicial sobre sentencia declaratoria e *in-*

junction quedan pendientes de adjudicar los emolumentos dejados de percibir por tan corto periodo, pues la suspensión de empleo y sueldo es un trámite accesorio al procedimiento principal, supeditado a éste y condicionado, para ser válido y tener efecto desde su origen, a que ocurra una destitución válida, final y firme. *Ramirez v. Municipio,* 72 D.P.R. 364, 368 (1951). Es estas circunstancias aplica la doctrina de agotamiento. El Poder Judicial debe ceder para que el foro administrativo dilucide y adjudique si Vélez Ramirez incurrió o no en conducta prohibida por la Ley Municipal que ameritaba su destitución. La decision es importante. En la medida en que oportunamente pueda recaer un dictamen final y firme en su contra, se afectan no sólo los salarios no devengados, sino su future politico y su capacidad para poder ocupar o ser nombrado para puestos públicos.

Se dictara sentencia confirmatoria y se devolveran los autos para tramite ulterior ante la Comision compatible con lo resuelto.

Los jueces Asociados Señores Torres Rigual y Diaz Cruz concurren en el resultado sin opinión.

VICTOR COLON PEREZ, RECRURENTE, V. ALCALDE DEL MUNICIPIO DE CEIBA Y JUNTA DE APELACIONES DEL SISTEMA DE ADMINISTRACION DE PERSONAL, RECURRIDOS.

Numero: R-81-77 *Resuelto:* 12 de mayo de 1982.

1. MUNICIPIOS—CORPORACIONES MUNICIPALES—FUNCIONARIOS Y EMPLEADOS—FUNCIONARIOS MUNICIPALES—ELECTION O NOMBRAMIENTO—PROCEDIMIENTOS PARA DETERMINAR SU VALIDEZ.
Distinto a las agencias en que el plan sobre puestos de confianza deberá ser aprobado por la Oficina Central de Personal, el deber de los municipios es remitir a dicha oficina el plan con el propósito de que ésta coteje, esto es, confronte si el mismo cumple o no con lo dispuesto

APPENDIX C (TRANSLATION)

IN THE SUPREME COURT OF PUERTO RICO

Nos. R-79-285
O-79-438

WALTER VELEZ RAMIREZ *et al.*,
Plaintiffs and appellants

Review and Appeal (Consolidated)

v.

HON. CARLOS ROMERO BARCELO *et al.*,
Defendants and appellees

MR. JUSTICE NEGRON GARCIA delivered the opinion of the Court.

San Juan, Puerto Rico, May 12, 1982

On January 9, 1975, Walter Vélez Ramirez, then Director of Public Works of the Municipality of Lajas, went before the State Insurance Fund with a claim for an accident suffered while in the discharge of his duties. He alleged that on January 6, while alighting from a jeep near a pipeline installation in the Playa Rosada sector, he slipped and injured a leg. The Fund processed his claim and Vélez Ramirez began to receive treatment and benefits as provided by law.

Vélez was appointed mayor in November 1975, substituting the incumbent who resigned. In the elections of 1976 he was candidate for the Popular Democratic Party. During the campaign his opponents made an issue of his injury claiming that it did not occur while in the exercise of official duties, but while he was playing baseball in the

José Basora park in Lajas on January 6. Vélez was elected mayor. On November 7, 1977, while in office, he received his last check from the Fund for the sum of $720. As a whole, he received benefits in excess of $1,900.

Afterwards, on July 28, 1977, representative José Granados Navedo wrote a letter to the Fund denouncing this situation. He accompanied the same with sworn statements by witnesses that saw Vélez suffer the accident during the above-mentioned baseball game. The agency opened an investigation.

Vélez gave a sworn statement before an auditor from the Fund on April 20, 1978. *He denied having played baseball on January 6.* The investigating officer, in his report to his superior, summarized the content of the statements made by several witnesses interviewed and concluded that there was conflicting evidence as to when or how the accident really took place. Finally, he suggested that the investigation be used and that the pertinent measures be taken in case fraud was indeed committed.

On June 2, 1978, the Director of the Internal Auditing Office of the Fund submitted his report to the Administration, stating that there was evidence of the possibility that Vélez's claim was illegal. He recommended (1) that a copy of the report be sent to the Justice Department and the Comptroller's Office; and (2) if found that fraud was indeed committed, to carry out the necessary action to recover the benefits granted. Following those recommendations the case was referred to the Justice Department. The Governor then informed Vélez on February 14, 1979, that he had filed a complaint before the Committee for the Settlement of Municipal Complaints (C.S.M.C.) on that date and that as of [February] 15, he was suspended from employment and salary pending a hearing on the charges. The two charges consisted of (1) having filed a false claim before the Fund with the intent of defrauding said agency and unlawfully appropriating public funds, as

action which commenced prior to becoming mayor and which he pursued after his election[1] and (2) having committed perjury upon denying under oath in his statement before the Fund's investigator[2] that he had played baseball on January 6.

The C.S.M.C. assumed jurisdiction and commenced proceedings. Vélez filed an "Action for Declaratory Judgment and Injunction" before the Superior Court on May 11, 1979, seeking his reinstatement and the stay of proceedings before the Committee.[3] The corresponding hearing having been held, the court *a quo* dismissed the claim with regard to the Committee's lack of power to elucidate the matter. It held the hearing on the preliminary injunction on June 20. On that same day, appellant resigned as mayor.

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[1] On February 20, 1979, a complaint was filed against Vélez, G-79-118, before the Mayaguez Superior Court for the offense of aggravated unlawful appropriation (att. 166 of the Penal Code, 33 L.P.R.A. § 4272), and sec. 11(a) of the Disability Benefit Act, 11 L.P.R.A. § 211(a). This last one provides:

> "Any person who makes a false statement or representation of a material fact knowing it to be false, or who knowingly conceals a material fact with intent to defraud so as to obtain or increase any benefit under this chapter, for himself or for another, shall incur the penalty prescribed by the Penal Code of Puerto Rico for larceny of the amount of money thus obtained by him or by such other person, and each such false statement or representation or concealment of a material fact shall constitute a separate offense."

We take judicial notice that on January 28, 1980, in a trial by jury, Vélez was found innocent of the charge filed. Rule 11 of the Rules of Evidence.

[2] No charges were preferred with regard to this count.

[3] Several electors who voted for him in the 1976 elections also appeared as plaintiffs on their own behalf and in representation of other electors on the same standing. Although they never were certified as class representatives, they continued in the suit in their individual capacity. The Governor, the Secretary of Justice, and the Committee for the Settlement of Municipal Complaints, through their members, were included as defendants.

The court finally rendered judgment denying the injunction upon concluding that the summary suspension was not arbitrary or unreasonable.

Aggrieved, Vélez filed a notice of appeal and review. We agreed to examine his contentions.

I

The appellant-petitioner raises five questions of law. Three of them deal with the Committee's jurisdiction to try him, and with whether or not the charges filed against him constitute unlawful or immoral conduct under art. 37 of the Municipal Law. We note that when Vélez Ramirez came before the court, the administrative proceedings had already begun. The claim for judicial intervention at so early a stage obliges us to consider if the administrative proceedings had to be exhausted or if they could be sidestepped in the face of the question on lack of jurisdiction. We agree with the first solution.

The Municipal Law,[4] in its art. 37, creates the Committee for the Settlement of Municipal Complaints, 21 L.P.R.A. § 1256. Its subsection (a) reads:

> The Governor of Puerto Rico, the municipal assembly, or any citizen may prefer charges

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[4] Act No. 142 of July 21, 1960 (21 L.P.R.A. § 1105 *et seq.*). Article 37 has its origin in Municipal Law No. 53 of April 28, 1928; art. 29, as amended by Acts No. 98 of May 15, 1931, 288 of April 9, 1946, 55 of April 18, 1950, and 4 of December 7, 1955.

Last year the new Organic Act of the Municipalities, Act No. 146 of June 18, 1980, was approved. It became effective on July 1, 1981. Insofar as the powers of the Committee to continue hearing the cases pending, its art. 13.01(c), 21 L.P.R.A. § 3501(c), provides:

> "Any civil or criminal action filed in relation with the repealed act, which is being prosecuted before this Act takes effect, shall continue until its final determination under the provisions in force at the time the cause of action was originated or the violation was committed."

> against the mayor for immoral conduct or unlawful acts involving inexcusable neglect or negligence or conduct prejudicial to the best public interest in the discharge of his duties.

The doctrine of exhaustion of administrative proceedings, as well as that of primary jurisdiction, meet the aim of maintaining an adequate balance and distribution of power and duties between administrative agencies and the judiciary, *Febres* v. *Feijoó*, 106 D.P.R. 676 (1978). The doctrine of primary jurisdiction seeks to determine if the *initial* intervention in a controversy corresponds to an agency or a court. On the other hand, the doctrine of exhaustion of administrative proceedings is aimed at clarifying *when* is the appropriate time for the courts to intervene in a controversy previously submitted to an administrative intervention. Hence, an examination as to its possible application arises when, after an agency has initiated a proceeding or action, judicial intervention is sought to review findings or to obtain judicial remedy, prior to the termination of the entire administrative proceeding. *Quiñones* v. *A.C.A.A.*, 102 D.P.R. 746 (1974), and *Commonwealth* v. *12,974.78 Square Meters*, 90 P.R.R. 494 (1964).

[1] The decision of whether or not the exhaustion doctrine is applicable does not depend on rigid or objective standards, but on whether in the light of the circumstances of the case and of the particular expertise of the agency involved, judicial intervention is considered premature. The balance of powers that should exist between agencies and courts, and the need and convenience of keeping a complete administrative record advice the culmination of administrative processes prior to judicial review. 3 Davis, *Administrative Law Treatise*, secs. 19.01 and 20.01, St. Paul, Minn., West Publishing Co. (1958), and Davis, *Administrative Law of the Seventies*, sec. 20.01, Rochester, New York, Lawyer's Co-operative Co. (1976).

[2] Nonetheless, there are situations where it is not necessary to exhaust said remedies, *Widow of Iturregui* v. *Commonwealth*, 99 P.R.R. 474, 477-478 (1970); *Quiñones* v. *A.C.A.A.*, *supra*; *López de Victoria* v. *Soler Favale*, 101 D.P.R. 710 (1973). A case which typifies the problem is when an agency's lack of jurisdiction on a matter under its consideration is questioned before a court. 3 Davis, *Administrative Law Treatise*, *supra*, sec. 20.02. According to professor Davis, the courts, and in particular the United States Supreme Court, have not been consistent in evaluating the problem and have not set clear guidelines as to when a review lies. Even so, case law proposes the weighing of three factors:[5] (1) the risk that irreparable injury be done to the affected party if the court stays its intervention allowing the proceedings to continue, (2) the degree of apparent clarity with which the lack or presence of jurisdiction arises, and (3) the expertise that the agency has to entertain questions pertinent to its jurisdiction. 3 Davis, *Administrative Law Treatise*, *supra*, sec. 20.03, at 69.

These tests adequately summarize the considerations to be taken into account on deciding whether or not the exhaustion requirement is applicable in the context of a question of lack of jurisdiction. Its use aids in deciding pursuant to the purposes and aims of the doctrine. Let us see its application to the case at bar.

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[5] These three factors have been followed in *State of Cal. ex rel. Christensen* v. *F.T.C.*,, 549 F.2d 1321 (9th Cir. 1977), *cert. denied*, 434 U.S. 876 (1977); *Casey* v. *F.T.C.*, 578 F.2d 793, 796 (9th Cir. 1978); *Marshall* v. *Able Contractors, Inc.*, 573 F.2d 1055, 1057 (9th Cir. 1978), *cert. denied*, 439 U.S. 826 (1978); *Lone Star Cement Corporation* v. *F.T.C.*, 339 F.2d 505 (9th Cir. 1964); *United States* v. *Rockland Steamship Corporation*, 218 F. Supp. 509, 513 (1963); *Oil Shale Corporation* v. *Udall*, 235 F. Supp. 606 (1964); *Allegheny Airlines, Inc.* v. *Fowler*, 261 F. Supp. 508, 517-520 (1966); *Campbell Sixty-Six Express, Inc.* v. *J. & G. Express, Inc.*, 244 Miss. 427, 141 So. 2d 720 (1962); *Willamette Valley Lumber Co.* v. *Ellis*, 226 Or. 543, 359 P.2d 98 (1961).

A. Risk of irreparable injury if the court stays its intervention:

[3] The statutory guarantee provided by art. 37(i), 21 L.P.R.A. § 1256(i), that any mayor who has been charge and removed by the Committee's resolution, has the right to direct judicial review by this Court,[6] minimizes the risk that the appellant may suffer irreparable injury by a stay in the judicial review of the question of jurisdiction.

First, the economic and social costs of the administrative proceeding are, to a greater or lesser extent, an inherent risk in this type of process, regardless of the fact that the defense of lack of jurisdiction prospers. The exhaustion requirement does not depend on the investment per se, but of the probability that the same be in vain because the agency, in effect, lacks jurisdiction. This, in turn, depends on the *clarity* of the jurisdictional question in that stage of the proceedings.

Second, the risk that the mere lapse of time and submitting to the process could unduly prejudice him, is minimal. Notwithstanding the argument that the proceedings before the Committee tend to be slow, it has not been shown that they cannot be speeded up or that that in itself could cause some particular prejudice. There are no indications that the opportunities to timely reproduce the jurisdictional question are minimized. Neither is there evidence that Vélez Ramirez has to surrender to the removal process until its culmination. The facts have shown that the effects of the complaint on his political career are few.[7]

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[6] Although the electors, appellants herein, do not have right to seek review of the Committee's decision, nothing stands in the way of their filing an action like the present one and reproducing the pertinent questions when said decision is issued.

[7] We take judicial notice of the fact that Vélez Ramirez was again elected mayor in the 1980 general elections, the office he presently occupies.

B. The degree of clarity on the lack or presence of jurisdiction:

The doctrine accepts that when lack of jurisdiction clearly arises, no benefit is obtained by obliging the litigant to remain in the agency until the process is culminated. Remedies then need not be exhausted. 3 Davis, *Administrative Law Treatise, supra,* § 20.01. To require it in those circumstances would be fruitless in terms of time and money, because the judicial forum would finally, with all probability, invalidate the process. Thus, to the degree that the jurisdictional question is less clear and those risks diminish, it is adequate to require the exhaustion of said remedies. Strengthening this view is the fact that the court has, at that stage, the record at its disposal and the benefit of the final decision taken by the agency, who is the specialized body on the matter.

In the case at bar, we are dealing with a statute specifically created to hear and adjudicate charges against mayors. That mission is clear and its ambit is defined. The lack of jurisdiction is not evident. On the contrary, it depends on the specification and settlement of facts not adjudicated at present. Determining if the charges filed reflect "immoral conduct or unlawful acts involving abandonment, inexcusable negligence, or conduct prejudicial to the best public interest in the discharge of his duties," is a matter which is subject to the process of interpretation. How restrictively or amply should these terms be construed? Are the conduct and actions charged immoral? Are they unlawful? Do they involve abandonment, inexcusable negligence, or conduct prejudicial to the best public interest? Does the phrase, "in the discharge of his duties," as it is employed in art. 37, comprise actions that necessarily occur during the time in office or those committed prior to being sworn in as mayor but with ulterior effects? Moreover, Vélez Ramfrez contends that the Committee cannot have jurisdiction in this case because (1) it is incumbent upon the Fund to make the compensability findings in a

work-related accident, pursuant to the liberal spirit of the law, and subject to the worker's right to obtain review in the Industrial Commission and the Supreme Court; and (2) that the Fund ruled that defendant-appellant was entitled to receive compensation and it has not reversed said ruling, which is res judicata.

[4] The questions raised, and the other assignments, move us to conclude that although the Committee has jurisdiction to hear the charges against Vélez Ramirez, the ambit of its power is not so clear in the unique circumstances of the case. There are several factors to be taken into account with regard to the question, that should be specified in its source by the Committee.[8]

C. The specialized knowledge of the agency to entertain questions pertinent to its jurisdiction:

[5] The Committee was specifically created to handle disciplinary proceedings regarding mayors. *Rodriguez* v. *Committee, etc.*, 84 P.R.R. 66 (1961). Supposedly, it is specifically empowered to determine what is "immoral conduct or unlawful acts involving inexcusable neglect or negligence or conduct prejudicial to the best public interest in the discharge of his duties." The ruling of whether or not there is jurisdiction depends greatly on the exercise of its administrative expertise. *McKart* v. *United States*, 395 U.S. 185, 193-194 (1969); *Myers* v. *Bethlehem Corp.*, 303 U.S. 41 (1938).

Although it could be argued that the case involves a statutory construction—a function par excellence of the courts—the truth remains that the manner by which the

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[8] Vélez filed a "Motion to Dismiss" before the Committee, where he substantially raised the questions concerning jurisdiction that were later reproduced before the Superior Court and this forum. Said motion had not been resolved when he filed his claim, or when the present actions were perfected. We do not have the benefit of the C.S.M.C.'s opinion and discussion on the matter.

Committee interprets said provision shall affect its jurisdiction. Hence, the Committee, as the body especially created to settle complaints against mayors, should be the one to intervene and decide the matter at first instance.

In gist, the necessary conditions that exclude the exhaustion of an administrative remedy in the face of a claim of lack of jurisdiction are not present. Whenever possible—taking into account, of course, the safeguarding of the interests at play—we shall keep an adequate balance between the powers of agencies and the courts, avoiding premature intervention. *Myers* v. *Bethlehem Corp.*, *supra*; *United States* v. *Utah Constr. Co.*, 384 U.S. 394 (1966). After all, the rule that it is preferable to exhaust the administrative action is a convenience compatible with justice which does not frustrate the final scrutiny by the courts. *Febres* v. *Feijoó*, *supra* at 681-682; *González Saldaña* v. *Superior Court*, 92 P.R.R. 462, 472 (1965).

II

Appellant points out that the right to suffrage guaranteed by Art. II, Sec. 2, of the Constitution of Puerto Rico does not tolerate that a mayor be deprived of the position duly won in free popular elections through acts foreign to the same. We cannot weigh this conclusion on its merits.

[6-7] First, constitutional attacks on administrative actions are subject to the rule of exhaustion of administrative remedies. *Dubois Clubs* v. *Clark*, 389 U.S. 309 (1967). Although administrative agencies cannot determine the constitutionality of the legislation that created them, they may determine if its application to the specific facts of a case would be unconstitutional. 3 Davis, *Administrative Law Treatise*, *supra*, sec. 20.04, at 74. In principle, the Committee would consequently have the power to dismiss or set aside a complaint upon considering that a removal by

virtue of a particular conduct—already establish—would be unconstitutional.

[8] Second, the assignment does not successfully overcome the rule of judicial abstention from entertaining constitutional matters unless it is necessary. *Galarza Soto* v. *E.L.A.*, 109 D.P.R. 179, 180, n. 1 (1979); *Commonwealth* v. *Aguayo*, 80 P.R.R. 534, 576 (1958). It is not correct to explore that aspect until findings are made and if the removal lies. That task demands a balance of the interests in conflict and requires the knowledge of all the details and circumstances surrounding the conduct of Vélez Ramirez. We reject the idea of settling the question in abstracto, or in the absence of a complete administrative record. Particularly in cases like the present one, where its adjudication requires the exercise of administrative record. Particularly in cases like the present one, where its adjudication requires the exercise of administrative discretion to determine the credibility of witnesses. 3 Davis, *Administrative Law Treatise*, *supra*, sec. 20.01, at 642-643, (1970 Supp.); *McKart* v. *United States*, *supra* at 193-194. Finally, we are not faced with a claim for a relief that the agency cannot grant.

In the light of the foregoing, we conclude that the learned trial court did not err in denying the declaratory remedy and injunction.

III

[9] Finally, let us direct our attention to the analysis of the argument of whether the summary suspension from employment and salary decreed by the Governor violated the due process clause guaranteed in Art. II, Sec. 7 of the Constitution of Puerto Rico and the Fifth and Fourteenth Amendments of the United States Constitution.

Contrary to the former approach, it is not necessary that a previous adjudication by the Committee exist in order to entertain the assignment, since the matter deals

with a decision of the Governor at the time the charges were preferred, an action taken in the light of the investigative record and other proof he had at the time. This suspension from employment and salary has some immediate negative effects on the officer and are of such a nature that they exclude consideration of the abstention rule. Then, it is incumbent upon the courts, and not on the Committee, to determine if under the Constitution the summary suspension violates the due process clause or not. Let us see.

[10] Article 37(j), in force at the time the charges were filed provided:

> At the time of preferring charges against the mayor, or at any time thereafter, *if in the judgment of the Governor it is advisable for the interests of the municipality*, he may decree that the mayor be suspended from office and his salary stopped until the case is definitely decided (Underscore supplied.) 21 L.P.R.A. § 1256(j).

The above-cited legal text clearly authorizes the Governor to decree the suspension of the mayor from office and salary after charges have been preferred until the same are decided. This power is constitutionally valid. *Fugate* v. *Wesson*, 157 S.E. 736 (1931); 4 McQuillin, *Municipal Corporations*, secs. 12.229-12.231 (3d ed. 1979). This does not mean that the Governor's authority is absolute or limitless. In our legal system no power is absolute. *Warner Lambert Co.* v. *Tribunal Superior*, 101 D.P.R. 378 (1973); *Santa Aponte* v. *Srio. del Senado*, 105 D.P.R. 750, 764 (1977). The very text of the law limits the Governor's powers of removal to those cases where it is convenient to the municipality's best interests. Hence, in implementing that power he cannot violate the due process of law.

[11] We have resolved that due process of law does not require a hearing prior to every deprivation of a right or property interests. When there is a temporary deprivation

of a right it suffices that the affected party have at any significant or convenient time the opportunity to defend himself and to present his case with adequate guarantees. There are occasions where the State has some compelling interest requiring temporary intervention with a person's liberty or property before he is afforded the opportunity of a hearing. The doctrine informs that in order to determine if the type of hearing granted and the moment chosen are constitutionally acceptable, one must jointly weigh the governmental interests with those of the affected party. *Rodriguez* v. *Tribunal Superior*, 104 D.P.R. 335 (1975); *Dominguez Talavera* v. *Tribunal Superior*, 102 D.P.R. 423 (1974); *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); 2 Davis, *Administrative Law Treatise*, secs. 11:12 and 12:14, at 388-395 and 462-463, San Diego, K.C. Davis Pub. Co. (2d ed. 1979).

[12] *Mathews v. Eldridge, supra*, announced three factors to be considered in weighing when the due process of law does not allow the suspension or removal of a person from office without a hearing. 2. Davis, *Administrative Law Treatise* (2d ed.), *supra*, sec. 13:12, at 509-512; Lawrence H. Tribe, *American Constitutional Law*, 540, Mineola, New York, The Foundation Press (1978); Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975). The three factors are: (1) the interests affected by the official actions; (2) the risk of an erroneous deprivation of a protected interest through the procedure used and the probable value of additional or substitute safeguards; (3) the government interest safeguarded by the summary action, including the function involved and the fiscal and administrative burdens that the additional procedural requirement would entail. Let us examine these factors.

A. The interest affected by the suspension:

[13] The summary suspension deprived appellant of his property rights such as salary and fringe benefits, as well

as of his right to discharge the office for which he was freely elected in the 1976 general elections. *Paul v. Davis*, 424 U.S. 693 (1976); *Fuentes v. Shevin*, 407 U.S. 67 (1972). These, of course, were not the only damages involved. We must note that we are dealing here with an official elected in a general election, who received the backing of electors of the Municipality of Lajas after the actions charged against him were amply debated in the political sphere. *Robledo, Mayor v. C.S.M.C.*, 95 P.R.R. 1, 13 (1967).

Our Constitution, in its Art. II, Sec. 2, guarantees equal, direct, and secret universal suffrage. It also protects the citizen against any coercion in the exercise of the electoral franchise. The right to suffrage is, in all its manifestations, at the very heart of democratic government. *Ortiz Anglero v. Barreto Perez*, 110 D.P.R. 84 (1980); *P.S.P., P.P.D., P.I.P. v. Romero Barcelo*, 110 D.P.R. 248 (1980); *P.P.D. v. Admor. General de Elecciones*, 111 D.P.R. 199 (1981); *P.P.D. v. Barreto Perez*, 110 D.P.R. 376 (1980); *P.S.P. v. Com. Estatal de Elecciones*, 110 D.P.R. 400 (1980). These guarantees ultimately imply that the individual vote truly has a value and efficacy in the selection of certain candidates to public office, which is complete when added to the expression of other citizens.

The 1976 elections proved that the will of the people was that Vélez Ramirez guide the future of the municipality for the next four years. Consequently, he had the duty to comply with that mandate. His summary suspension barred him from carrying out said duty. It affected the exercise of the electoral franchise and deprived those who voted for him from his services as mayor. The interests affected by the summary removal are undoubtedly far reaching and important. The fact that he was substituted by a member of his own party does not change the matter because it does not redress his affected personal rights and does not free the right of suffrage from prejudice. Application of the due process of law clause gets stricter as the individual interests affected and the social

and constitutional stakes grew stronger. *Addington v. Texas*, 441 U.S. 418 (1979).

The foregoing should be considered within the context of the summary removal question. This does not imply that we are giving our opinion on what should be the final outcome if the charges prove to be true. Neither does it mean that we are presently passing any judgment whatsoever as to the applicability of the case law doctrine adopted in *Winship, Governor v. Municipal Assembly*, 53 P.R.R. 131, 139-140 (1938), that, citing *State v. Welsh*, 79 N.W. 369 (1899), rejects the acquittal thesis concerning a past administration's actions and charges on the premise that the electors reelected the official, since:

> The very object of removal is to rid the company of a corrupt, incapable, or unworthy official. His acts during his previous term quite as effectually stamp him as such as those of that he may be serving. Re-election does not condone the offense. Misconduct may not have been discovered prior to election, and, in any event, had not been established in the manner contemplated by the statute.

B. The risk of an erroneous suspension:

The function of judicial review cannot limit itself to determining if the Governor's decision to summarily suspend a mayor from employment and salary is beneficial to the interest of the municipality, only taking into account the evaluation of the preferred charges, and considering them as true. That restrictive view would represent an unacceptable standard since it would practically turn the Governor into the one and only arbiter of municipal matters, thus depriving the prejudiced parties of the right to go to the courts to challenge that action.

In carrying out that task the Judicial Power should weigh the whole picture that the Governor had at his

disposal at the time he took his decision. Let us see the factors present at the date of his suspension: (1) appellant had been mayor for approximately thirty-nine (39) months after he filed his claim before the Fund; (2) the events that gave rise to the charges were known in political circles from the very start; (3) there was quite a long period of time between the claim and the preferment of charges; (4) the Comptroller had intervened with three years of Vélez Ramirez's administration and had found no irregularities in the use of public funds; and (5) all the reports rendered by the investigators of the Fund and the Department of Justice with regard to the investigations that preceded the preferment of charges and the suspension showed that the evidence—consisting of different sworn statements—was contradictory with regard to just how the accident occurred.

After giving it some thought we are convinced that these factors reflect a serious and real controversy with regard to the final outcome of the facts charged. It is generally acknowledged that when a real controversy exists concerning the important facts, these should *not* be adjudicated, even provisionally, without granting the affected party the opportunity to rebut them. The situation is more important when the evidence against the person, as in the case at bar, is oral in nature. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978).

[14] The Governor's decision to suspend him operates within this factual framework. Was this course of action convenient to the best interests of the municipality? Surely there was a controversy as to the veracity of the facts in conflict. Likewise, the preliminary inventory of the circumstances described as a whole is not totally clear. Hence, it is reasonable to conclude that, at the moment of the

suspension, there was a risk that the same would be executed in an erroneous manner.[9]

C. The government interest safeguarded by the summary removal and suspension:

In *Robledo, supra*, we recognized the protective interests whose safeguarding is the Committee's obligation when choosing to remove a mayor:

> The manner in which the statute is drafted suggests that the governing view for the removal does not partake of a punitive nature for the incumbent but contemplates the purpose of avoiding prejudice to the public interest. The measure should contemplate the improvement of public service, and therefore, conduct prejudicial to the morale and efficiency of the public function must be involved. . . . that defendant's action [must have] affected in a substantial and irreparable manner the operation of the municipal government. At 12-13.

Likewise, in *Diaz v. Charneco*, 48 P.R.R. 521, 525 (1935), citing *Words & Phrases Judicially Defined*, we stated that the cause is a "legal cause, and not any cause which the council may think sufficient. The cause must be one which specially relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. A cause must be one attaching to the qualifications of the officer or his performance of its duties, showing that he is not a fit or proper person to hold the office."

In short, the removal seeks to protect the municipality against fraudulent, corrupt, and irresponsible use of public

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[9] The facts in *Levesque v. State of Me.*, 587 F.2d 78 (1978); *Arnett v. Kennedy*, 416 U.S. 134; and *Commissioner of Insurance v. Superior Court*, 100 P.R.R. 545 (1972), cited by the trial court, are very different and distinguishable from those in the case at bar.

funds and property and from the abuse of powers inherent to the office of mayor. As a logical corollary, a summary suspension by the Governor pursues the same end.

However, a difference is evident insofar as the removal by the Committee and the suspension by the Governor is concerned. In the first one, art. 37(d) requires a preliminary hearing and in the latter no, although the Governor is not obliged to suspend mayors immediately after charges are preferred, he is empowered to do so at that time or at a later moment. If he does not suspend him immediately he can do so at a later date.

Case law recognizes a series of situations where the interest protected is of such intensity and nature that a preliminary hearing is unnecessary: the seizure and destruction of foodstuffs unfit for human consumption, *North American Storage Co. v. Chicago*, 211 U.S. 306 (1908); taking possession of a bank branch when its operation is found to be illegal and is unsafe because of faulty management, the situation being one that could cause harm to the creditors and public, *Fahey v. Mallonee*, 332 U.S. 245, 253 (1947); the confiscation of misleading labels, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950); the determination of probable cause to arrest, *Gerstein v. Pugh*, 420 U.S. 103 (1975); the garnishment of a bank account, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); seized vessel carrying criminal evidence, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); suspension of disability benefits under the Social Security Act, *Mathews v. Eldridge, supra.*

On the other hand, there are situations where a preliminary hearing is necessary. For example: the termination of aid to families with dependent children when they are economically disadvantaged, *Goldberg v Kelly, supra*; garnishment of wages, *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); a private party seizure in replevin,

Fuentes v. Shevin, supra; *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

This case law allows us to see the essential idea behind the test that justifies summary actions without a preliminary hearing, to wit, the existence of a sufficiently strong need capable of overshadowing the right of a given party and allowing for the temporary loss of the same. A balance must be struck between conflicting interests. 2 Davis, *Administrative Law Treatise* (2d ed.), *supra*, sec. 11:12, at 391. When weighing the tests in controversy in search of that balance, the functions involved, the fiscal and administrative burdens, and the previous and subsequent guarantees granted to the affected party with the summary suspension must all be taken into account. Among those subsequent guarantees of prime importance is the determination of whether or not there is a right to a speedy hearing to elucidate the charges or actions preferred. *Mitchell v. W. T. Grant Co., supra* at 607; *Goss v. Lopez*, 419 U.S. 565 (1975); *Barry v. Barchi*, 443 U.S. 55 (1979).

We note, with regard to the statute before our consideration, that art. 37 requires the preferment of charges before the Committee, as one of the guarantees prior to suspension. Furthermore, the evidence that the Governor has must be sufficient to show that in his judgment said decision is to the best interests of the municipality. Rule 9 of the Rules of Evidence; art. 37(e)[10] This does not mean, of course, that the judgment should fall exclusively on the incumbent governor. It should reflect the view of a prudent and reasonable person who in the face of sufficient

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[10] For purposes of the Committee, the evidence should be clear if the dismissal is permanent. 2A Antieau, *Municipal Corporation Law*, sec. 22.163, at 22-245, New York, Matthew Bender (1979); *De Castro v. Board of Commissioners*, 57 P.R.R. 149, 159 (1940). Moreover, the action must have "affected in a substantial and irreparable manner the operation of the municipal government." *Robledo, Mayor v. C.S.M.C.*, 95 P.R.R., at 13.

evidence can conclude that the mayor's suspension is to the best interests of the municipality.

Once that course of action is adopted without holding a preliminary hearing, the subsequent guarantees are vitally important. Article 37 recognizes four fundamental guarantees. *First*, notification of the preferred charges. *Second*, the right to answer them in writing within 10 days and to appear *pro se* or by counsel. *Third*, it gives the Committee the power to pass judgment on the summary suspension before passing upon the merits of the charges. Though, art. 37, from its face, does not expressly vest such authority on the Committee, in strict judicial construction one must admit that it does implicitly have it. Two reasons affirm this fact, to wit: (1) art. 37(d) empowers the Committee to—if it deemed that the charges are frivolous and insufficient or that do not prima facie involve immoral conduct or unlawful acts involving abandonment, inexcusable negligence or conduct prejudicial to the best interests in the discharge of his duties—dismiss the same *without a hearing*; and (2) if the Committee, upon weighing the charges or at any later moment, determines that the unlawful acts proven are of a slight nature—which pursuant to subsection (e) of art. 37 do not allow the dismissal of a mayor—it can deem the summary suspension as unnecessary and shall order the setting aside of the same and reinstatement of the mayor with all the benefits as if the suspension had never occurred, plus further proceedings. And *fourth*, a record of the hearing shall be kept.

Case law has upheld the validity of proceedings similar to those in the present case. Thus, in *Dominguez Talavera v. Tribunal Superior*, 102 D.P.R. 423 (1974), we upheld the validity of an attachment without a preliminary hearing as authorized by art. 6 of the Conditional Sales Act, 10 L.P.R.A. § 36, and Rule 56 of the Rules of Civil Procedure of 1958, due to the existing guarantees, prior and subsequent to an embargo, such as (1) judicial intervention;

(2) posting of a bond by the parties performing the attachment; (3) the power to lift the attachment; and (4) the debtor's right to a prompt hearing to challenge the attachment.

In the case at bar, the decision at stake is similar in nature. The only noticeable difference is in the manner that the evidence before the Governor was unilaterally weighed in an ex parte fashion. This could in certain instances make ephemeral the requirement of "sufficient evidence," which could result in making the summary suspension unreasonable in comparison with the seriousness of the charges preferred. This imposes on the courts a special obligation upon reviewing decisions of this nature. *Cf.* Davis, *Discretionary Justice*, Louisiana State Univ. Press, Baton Rouge (1969); *Hernandez Denton v. Quinones Desdier*, 102 D.P.R. 218 (1974).

IV

Going back to the moment of the suspension and applying the three factors previously stated and weighed in a balanced manner, we harbor serious doubts as to the reasonableness and validity of appellant's suspension. First, we have seen that the rights affected are far-reaching and important. Second, the circumstances as a whole that the Governor had before his consideration when ordering the suspension were not entirely clear. There was a great risk that the evidentiary grounds of the investigation—oral and conflictive in nature—would propitiate an erred action. Third, the retention of appellant in office posed no fiscal or administrative burden for the Municipality of Lajas or for the Government of Puerto Rico. *According to the Comptroller*, he had completed three years of satisfactory work. Fourth, quite a long period of time had elapsed between the moment the illegal action alleged was committed and the preferment of charges. Was the suspension so pressing at the time that it could not wait for an initial finding by the Committee on whether or not the charges were friv-

olous and insufficient, or whether an unlawful action so slight in nature was involved that it did not deserve such a sanction?

[15] It is not necessary to answer those questions now. The record show that appellant resigned from office on June 20, 1979, that is, four (4) months and five (5) days after his suspension. This conduct is totally incompatible with the claim for prompt remedial action in procedural and substantial dimensions. The electoral term for which he was suspended has expired. He was reelected for the present term. As part of this judicial action on declaratory judgment and injunction, the salary not received during this short span of time is still pending adjudication, since the suspension from employment and salary is a separate step from the main proceeding, subject to it and conditioned, for it to be valid and effective from its origin, to a valid, final and unappealable removal. *Ramirez v. Municipality*, 72 P.R.R. 342, 345 (1951). The doctrine of exhaustion of administrative proceedings applies under these circumstances. The Judicial Power should not intervene so that the administrative forum may weigh and adjudicate whether or not Vélez Ramirez observed conduct prohibited by the Municipal Law which would merit removal. The decision is important. Until a final and unappealable decision can timely be rendered, it could affect not only the uncollected wages, but also his political future and his capacity to occupy or be nominated to public office.

The judgment appealed shall be affirmed and the record shall be remanded to the Committee for further proceedings consistent with this decision.

Mr. Justice Torres Rigual and Mr. Justice Diaz Cruz concur in the result without an opinion.

CHIEF CLERK'S CERTIFICATE

I, Bruno Cortés Trigo, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the opinion rendered by this Court on May 12, 1982, in case Nos. R-79-285, 0-79-438, *Velez Ramirez et al. v. Romero Barcelo et al.*, the original of which, in Spanish, is under my custody in this Office.

IN WITNESS WHEREOF, at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court in San Juan, Puerto Rico, this 31st day of December, 1986.

/s/ BRUNO CORTES TRIGO
BRUNO CORTES TRIGO
Chief Clerk
Supreme Court of Puerto Rico

APPENDIX D

Estado Libre Asociado de Puerto Rico
DEPARTAMENTO DE INSTRUCCION PUBLICA
Hato Rey, Puerto Rico

AWILDA APONTE ROQUE SECRETARIA DE INSTRUCCION PUBLICA Querellante Vs IPCIA M. KERCADO MELENDEZ SUPERINTENDENTE DE ESCUELAS Querellada	SOMBRE: CANCELACION DE CERTIFICADOS DE MAESTRO POR: NEGLIGENCIA, INSUBORDINACION Y CONDUCTA INCORRECTA Y LESIVA AL BUEN NOMBRE DEL SISTEMA DE INSTRUCCION PUBLICA

Q U E R E L L A

A: SRA. IPCA M. KERCADO MELENDEZ

Investigaciones realizadas por funcionarios del Departamento de Instrucción Pública demonstraron que usted ha incurrido en faltas constitutivas en Negligencia, Insubordinación, Conducta Incorrecta y Lesiva al buen nombre del Sistema de Instrucción Pública de Puerto Rico, en el desempeño de sus funciones como Superintendente de Escuelas en el Disrito Escolar de Dorado, consistentes en lo siguiente:

1. No tramitó el nombramiento de catorce Ayudantes de Maestros en el Distrito Escolar de Dorado desobedeciendo asi las directrices de la Directora de la Region Educativa de Bayamón.

2. Mantuvo trabajando en su oficina a la Sr. Clara Luna Garcia durante el mes de agosto de 1985, sin autorización de la Directora Regional ni de

la Secretaria de Instrucción Pública, sabiendo que la señora Luna habia sido reinstalada a su puesto permanente de Maestra de Matemáticas.

3. Mantuvo trabajando en su oficina al Sr. José W. Ramos Urbina sin autorización de la Directora Regional ni de la Secretaria de Instrucción Pública, sabiendo que fue reinstalado a su puesto permanente de maestro de escuela elemental, efectivo el 1ro. de julio de 1985
4. Alteró las funciones del Sr. Héctor J. López Maldonado, Superintendente Auxiliar, impidiéndole que se desempeñe normalmente para el puesto en que fue nombrado, afectando asi el buen funcionamiento del Distrito Escolar de Dorado.

Esta conducta suya constituye insubordinación y negligencia en el desempeño de sus funciones y causa suficiente para la cancelación de su certificado de superintendente, a tenor con lo dispuesto por los incisos (c), (d) y (g) del Articulo 1, de la Ley Núm. 115, de 30 de junio de 1965, según enmendada (18 L.P.R.A. sec. 274).

Su conducta constituye además, una violación a las disposiciones del Articulo 6, de la Ley Núm. 5 de 14 de octubre de 1975, según enmendada, conocida como Ley de Personal del Servicio Público de Puerto Rico (3 L.P.R.A. s1371).

Habiéndoes celebrado una vista informal el dia 26 de noviembre de 1985, ante un representante mio, donde usted tuvo la oportunidad de explicar su versión de los hechos, y habiendo analizado el informe rendido luego de esa reunión, he decidido emitir la siguinte.

O R D E N

Los hechos antes expuestos justifican la presente acción administrativa centra la querellada por las causales com-

prendidas en los incisos (c), (d) y (g) del Articulo 1, de la Ley Núm. 115, de 30 de junio de 1965, segun enmendada que dispone en lo pertinente lo siguinte:

> "El Secretario de Instrucción Pública podrá cancelar el certificado de cualquier maestro permanente o suspender dicho certificado por tiempo determinado mediante el procedimiento que aqui se dispone, por cualquiera de las siguientes causas:
>
> (a) * * *
>
> (b) * * *
>
> (c) Negligencia en el desempeno de las funciones como maestro.
>
> (d) Insubordinacion.
>
> (e) * * *
>
> (f) * * *
>
> (g) Observancia de una conducta incorrecta o lesiva al buen nombre del Sistema de Instrucción Pública de Puerto Rico."

Los hechos antes mencionados constituyen también violaciones a varias disposiciones del Articulo 6, de la Ley Núm. 5 de 14 de octubre de 1975, según enmendada, que dispone lo siguiente:

> "Los empleados del Sistema de Personal del Servicio Público tendrán los siguientes deberes y obligaciones:
>
> (1) * * *
>
> (2) Observar normas de comportamiento correcto, cortés y respetuoso en sus relaciones con sus supervisores, compañeros de trabajo y ciudadanos.

(3) * * *

(4) Acatar aquellas órdenes e instrucciones de sus supervisores compatibles con la autoridad delegada en éstos y con las funciones y objetivos de la agencia donde trabaja.

(5) * * *

(6) * * *

(7) * * *

(8) * * *

Los empleados no podrán

(1) * * *

(2) * * *

(3) * * *

(4) Observar conducta incorrecta o lesiva al buen nombre de la agencia o al Gobierno de Puerto Rico.

(5) * * *

(6) * * *

(7) * * *

A tenor con lo dispuesto en las referidas leyes, es mi deber tomar la presente acción administrative consistente en:

Cancelarle el certificado de superintendente y/o suspender el proceso de renovación del mismo, separarla de empleo y sueldo y destituirla del Servicio Público.

La Presente Orden sera efectiva a partir de la notificación y recibo de la misma por parte de la querellada.

Se advierte a la querellada que la antes citada Ley Núm. 115 de 30 de junio de 1965, le concede el drecho de apelar

la prsente Orden en lo relativo a la Cancelación del Certificado de Superintendente, ante la Junta de Apelaciones del Sistema de Instrucción Pública, dentro del término de diez (10) dias contados a partir del recibo de la misma.

Podrá asimismo, apelar esta determinación en lo relacionado con la destitución del Servicio Público, dentro de un término de 30 dias contados a partir del recibo de esta comunicación, ante la Junta de Apelaciones del Sistema de Administración de Personal en caso de no estar de acuerdo con la acción tomada.

De no apelarse esta Orden dentro de los términos legales antes expresados, la misma advendrá final y firme.

La Junta de Apelaciones del Sistema de Instrucción Pública está localizada en el Edificio El Centro I, Oficina 2-A, Calle La Hija del Caribe, Hato Rey, Puerto Rico. La Junta de Apelaciones del Sistema de Administración de Personal está localizada en Calle San Justo #150, Viejo San Juan, San Juan, Puerto Rico.

Ante ambas Juntas podrá comparecer por si misma o asistida de abogado a ofrecer evidencia y a contrainterrogar testigos.

Se notificará a la querellada de esta Orden mediante el envio del original por correo certificado con acuse de recibo y con notificacion de la misma a la Directora de la Región Educative de Bayamón.

En San Juan, Puerto Roci, hoy dia 9 de diciembre de 1985.

/s/AWILDA APONTE ROQUE
AWILDA APONTE ROQUE
Secretaria de Instrucción Pública

CERTIFICADA CON ACUSE DE RECIBO

APPENDIX D (TRANSLATION)

Commonwealth of Puerto Rico
DEPARTMENT OF EDUCATION
Hato Rey, Puerto Rico

AWILDA APONTE ROQUE SECRETARY OF EDUCATION	)	
Complainant	)	RE: CANCELLATION OF TEACHING CERTIFICATE
vs.	)	
IPECIA M. KERCADO MELENDEZ SUPERINTENDENT OF SCHOOLS	)	FOR: NEGLIGENCE, INSUBORDINATION AND CONDUCT WHICH IS NOT CORRECT AND INJURIOUS TO THE GOOD NAME OF THE EDUCATION SYSTEM
Defendant	)	

COMPLAINT

TO: MRS. IPICA M. KERCADO MELENDEZ

Investigations carried out by officers of the Department of Education proved that you have incurred in faults constituting Negligence, Insubordination, Conduct which is Incorrect and Injurious to the good name of the Puerto Rico Education System, in the performance of your functions as Superintendent of Schools of the School District of Dorado, consisting in the following:

1. You failed to process the appointment of fourteen Teacher's Aides at the School District of Dorado, thereby disobeying the directives of the Director of the Bayamo'n Educational Region.

2. You kept Mrs. Clara Luna Garci'a working at your office during the month of August, 1985, without authorization from the Regional Director or the Secretary of Education, even though you knew that Mrs. Luna

had been reinstated to her permanent position as Mathematics Teacher.

3. You kept Mr. José W. Ramos Urbina working at your office without authorization from the Regional Director or the Secretary of Education, even though you knew that he had been reinstated to his permanent position as elementary school teacher, effective July 1, 1985.

4. You altered the functions of Mr. Héctor J. López Maldonado, Assistant Superintendent and prevented him from normally carrying out the job for which he was appointed, thereby affecting the sound operation of the Dorado School District.

This conduct of yours constitutes insubordination and negligence in the performance of your functions and sufficient cause to cancel your certificate as Superintendent, pursuant to the provisions of clauses (c), (d), and (g) of Article 1, of Act No. 115, June 30, 1965, as amended (18 L.P.R.A. Sec. 274).

Your conduct also constitutes a violation to the provisions of Article 6 of Act No. 5 of October 14, 1975, as amended, known as the Public Service Personnel Act (3 L.P.R.A. § 1371).

After having held an informal hearing on November 26, 1985 before one of my representatives, where you were given the opportunity to explain your version of the facts, and after analyzing the report submitted after that meeting, I have decided to issue the following

ORDER

The above stated facts justify the present administrative action against defendant for the reasons contained in clauses (c), (d), and (g) of Article 1, of Act No. 115, June 30, 1965, as amended, which provides the following in its pertinent part:

"The Secretary of Education may cancel the certificate of any permanent teacher or suspend said certificate for a specific period of time pursuant to the procedure stated herein, for any of the following reasons:

(a) * * *

(b) * * *

(c) Negligence in the performance of his functions as a teacher.

(d) Insubordination.

(e) * * *

(f) * * *

(g) Observance of conduct which is incorrect or injurious to the good name of the Puerto Rico Education System.

The above stated facts also constitute violations to several provisions of Article 6 of Act No. 5 of October 14, 1975, as amended, which provides the following:

"The employees of the Public Service Personnel System will have the following duties and obligations:

(1) * * *

(2) Observe the standards of correct, courteous and respectful behavior in their relationships with their supervisors, fellow workers and citizens.

(3) * * *

(4) Follow the orders and instructions of their supervisors which are compatible with the authority delegated to them and with the functions and objectives of the agency where they work.

of 30 days counted from the date of receipt of this communication, before the Board of Appeals of the Personnel Administration System, if you are not in agreement with the action taken.

If this Order is not appealed within the aforementioned legal terms, if will become final and binding.

The Board of Appeals of the Public Education System is located at El Centro I Building, Office 2-A, La Hija Del Caribe Street, Hato Rey, Puerto Rico. The Board of Appeals of the Personnel Administration System is located at #150 San Justo Street, Old San Juan, San Juan, Puerto Rico.

You may appear before both Boards on your own or assisted by an attorney to offer evidence and to cross-examine witnesses.

Defendant will be notified of this Order through the remittance of the original by certified mail, return receipt requested and notification of same to the Director of the Bayamón Educational Region.

In San Juan, Puerto Rico, this 9th day of December, 1985.

(sgd.) AWILDA APONTE ROQUE
AWILDA APONTE ROQUE
Secretary of Education

CERTIFIED
No. _____

CERTIFIED, RETURN RECEIPT REQUESTED

(5) * * *

(6) * * *

(7) * * *

(8) * * *

Employees cannot

(1) * * *

(2) * * *

(3) * * *

(4) Observe conduct which is incorrect or injurious to the good name of the agency or the Government of Puerto Rico.

(5) * * *

(6) * * *

(7) * * *

Pursuant to the provisions of the aforementioned laws, it is my duty to take the present administrative action consisting in:

Cancelling your certificate as superintendent and/or suspending its renewal, separating you from employment and salary and dismissing you from the Public Service.

This Order will be in effect as of its notification and receipt by defendant.

Defendant is apprised that the aforementioned Act No. 115 of June 30, 1965 grants the right to appeal the present Order insofar as thc Cancellation of the Certificate of Superintendent is concerned, before the Board of Appeals of the Public Education System, within the term of ten (10) days, counted from the date of its receipt.

You may also appeal this determination insofar as your dismissal from the Public Service is concerned, within a term

APPENDIX E

P.R. LAWS ANN. TIT. 18, §249e.

§ 249e.—Discrimination; reprisal

The school authorities and all other authorities are hereby enjoined from all discrimination or reprisal against a teacher by reason of his affiliation, creed and political actions; and it is further forbidden that the circumstances mentioned above be taken into consideration in deciding questions such as transfers, work assignment, salary raises, promotions, scholarships, leaves of absence, and any other matters relative to the teacher's professional work or status.—June 3, 1960, No. 25, § 7, eff. June 3, 1960.

APPENDIX F

PR LAWS ANN. TIT. 18, § 274-274o.

§ 274. Procedure for cancellation of certificates—Causes

The Secretary of Education may permanently cancel the certificate of any teacher, or suspend such certificate for a definite period of time, through the procedure herein provided, for any of the following causes:

(a) Prevarication, bribery or immoral conduct.

(b) Incompetency in the discharge of his duties as a teacher.

(c) Negligence in the discharge of his duties as a teacher.

(d) Insubordination.

(e) Being convicted of a felony by any court.

(f) Incurrence of the conduct forbidden by sections 249-249e of this title.

(g) Disorderly or improper conduct, or such as is prejudicial to the good name of the public education system of Puerto Rico.

(h) Holding a certificate through fraud or deceit.—June 30, 1965, No. 115, p. 321, § 1, eff. June 30, 1965.

§ 274a.—Notification

If, upon investigation, the Secretary of Education is satisfied that a teacher has incurred any of the causes enumerated in the preceding section 274, he shall serve on the teacher an order of suspension or cancellation of certificate jointly with a complaint specifying the charges which are ground for such action. While the investigation is under way, the Secretary may relieve any teacher subjected thereto from the discharge of his office for a period of not more than ten (10) days. During such period of time the teacher shall continue to draw his salary. Both the

order and the complaint shall be signed by the Secretary of Education or by the officer to whom he may expressly delegate such power, and shall be served on the teacher by registered mail at his last known address. Upon receipt of such copy of the order, the teacher shall cease in the discharge of his duties. The order shall contain a notice to the affected teacher of his right to appeal therefrom before the Board hereby created, within the term of ten (10) days after such notice is given.—June 30, 1965, No. 115, p. 321, § 2, eff. June 30, 1965.

§ 274b.—Effect of expiration of time for appeal

If not appealed from within the term of ten (10) days, the order shall become the suspension or cancellation order of the Secretary, and it shall be final and conclusive. The suspension of the certificate shall entail the severance of the teacher from his office for the time specified in the order.—June 30, 1965, No. 115, p. 321, § 3, eff. June 30, 1965.

§ 274c.—Time for appeal

If not satisfied with the order, the teacher thereby aggrieved may file a writ of appeal with the Board of Appeals of the Public Education System within the term of ten (10) days after receiving notice with a copy of the order.—June 30, 1965, No. 115, p. 321, § 4, eff. June 30, 1965.

§ 274d.—Status of teacher during appeal

The filing of the writ of appeal in the Board of Appeals of the Public Education System shall stay the effect of the order of cancellation or suspension of the certificate. In such case the Secretary may, pending decision on the appeal, suspend the teacher from office and salary or adopt any other measure he may deem suitable in the interest of the public education system for a term of not more than ninety (90) days counting from the date of the order. Any extension of the period of ninety (90) days must be approved by the Board of Appeals of the Public Education

System, upon request of the Secretary with notice to the appellant.—June 30, 1965, No. 115, p. 321, § 5, eff. June 30, 1965.

§ 274e.—Creation of Board of Appeals of Public Education System

The Board of Appeals of the Public Education System is hereby created, which Board shall be composed of three persons, one of whom shall be a lawyer or a bachelor of law. The same shall be appointed by the Governor, with the advice and consent of the Senate, for a term of four (4) years, and shall hold office until their successors shall have been appointed and qualified. None of the Board members may be an employee of the public education system and shall fulfill their respective offices without pay, but shall be entitled to be reimbursed for travelling expenses incurred and shall receive per diems at a rate of thirty-five (35) dollars for each day of meeting. The lawyer or bachelor of law shall preside over the Board, but any of its members may preside over the hearings in absence of the chairman. The Secretary of Education shall provide the Board with facilities for holding its hearings and deliberations, and with the equipment necessary for fulfilling its purpose. The Board shall appoint a secretary and any other necessary personnel who shall be included in the noncompetitive service. The Board may adopt such bylaws as it may deem fit and adequate for its proper operation. It shall have powers to issue subpoenas requiring the appearance of witnesses and the production of documents at the hearings, and it shall issue subpoenas at the request of the interested parties. Should any person summoned by the Board refuse to appear, any of the parties may request of a Court of First Instance that such witness be ordered to appear and testify before the Board. The court shall then issue a subpoena compelling the witness to appear and testify before the Board. If the person still refuses to appear, he shall be prosecuted for contempt of court. Testimony before the Board shall be under oath or affirma-

tion, and its members shall have power to administer oaths to the witnesses.—June 30, 1965, No. 115, p. 321, § 6; June 7, 1967, No. 114, p. 354; June 24, 1971, No. 102, p. 340, eff. July 1, 1971.

§ 274f.—Hearing; setting

Upon being served with notice of the writ of appeal, the Board shall set the date, place and hour for the holding of a hearing of appeal, which shall be scheduled to take place within the thirty (30) days following the filing of the writ. Notice of such hearing shall be given no less than ten (10) days in advance of the holding thereof. The appellant shall be warned of his right to appear personally or assisted by counsel, to present evidence and cross-examine witnesses.—June 30, 1965, No. 115, p. 321, § 7, eff. June 30, 1965.

§ 274g.—Hearing; Board in bank; testimony

The hearing shall be held before the Board in bank, or before two of its members. If the case is examined by two members, the decision of said members, together with the transcript of evidence, their finding of facts and any consideration pertinent to the question at issue shall be filed with the Board for final resolution in which at least two of its members shall concur and sign it. In the event of inhibition, absence, temporary disability or vacancy in the office of any of the members of the Board, the two remaining members may discharge all powers and functions of said Board. The testimony shall be taken in shorthand or by means of a recorder on indelible tape.—June 30, 1965, No. 115, p. 321, § 8; June 7, 1967, No. 114, p. 354; June 24, 1971, No. 102, p. 340, eff. July 1, 1971.

§ 274h.—Hearing; form

The hearing shall be public, unless the appellant waives such right. The Secretary of Education's attorney shall present his evidence first. The appellant shall have the right to appear personally or represented by counsel, to

examine the witnesses against him, and present his evidence. The rules of evidence shall not be compulsory in this proceeding. Both the appellant and the Secretary of Education shall have the right, upon request, to be informed, before the hearing, of the names and addresses of the witnesses of the other party, and also to be served with copy of all statements sworn to or signed by the witnesses of the other party.—June 30, 1965, No. 115, p. 321, § 9, eff. June 30, 1965.

§ 274i.—Decision; time for issuance; notification; reconsideration

On or before the fifteenth (15th) day following the hearing, the Board shall render its decision, which must have been jointly agreed upon by at least two of its members, who shall sign the same. The decision may affirm, revoke or modify the order of the Secretary. The Board's decision shall be served by registered mail to the parties and counsel thereof, at their last known address. The party adversely affected by the decision may petition the Board for reconsideration thereof within the five (5) days next following the serving thereon of notice of the decision. If the motion for reconsideration is not set for discussion by the Board, or if flatly rejected thereby within the next following five (5) days, the reconsideration shall be considered refused.—June 30, 1965, No. 115, p. 321, § 10, eff. June 30, 1965.

§ 274j.—Medical examination

Whenever the Secretary of Education shall have sound reasons to believe that a teacher of the public education system is physically or mentally disabled, he shall order the latter to undergo a medical examination by one or more physicians designated by the Secretary. Meanwhile, if he deems it advisable in the interest of the system, he may relieve the teacher from his duties. If from the medical examination it follows that the teacher is physically or mentally disabled to perform his functions as such, the

Secretary shall direct his severance for the duration of his disability, or adopt any other measure he may deem necessary for the good and the proper operation of the public education system. If the teacher is not satisfied with the disability severance order he may, within ten (10) days after a copy of the order was served on him, appeal to the Board of Appeals, which shall prosecute the appeal pursuant to the procedure herein established, with preference over all other cases. The Board may direct any teacher whose physical or mental state is questionable, to submit himself to a medical examination by one or more specialists designated by the Board. The refusal of a teacher, without just cause, to comply with the order of the Secretary or of the Board requiring him to submit himself to medical examination shall be cause for his severance from office without the need for further proceedings. In the cases covered by this section, the teacher shall be entitled to the payment of such licenses as may have accrued to him, and if the license is all used up, he shall continue to receive his salary until such time as the Board shall make a decision. If the decision be favorable to him, the teacher shall receive his salary until reinstated in his position.June 30, 1965, No. 115, p. 321, § 11; June 7, 1967, No. 114, p. 354, eff. June 7, 1967.

§ 274k.—Provisional certificates; cancellation; petition

The Secretary may, without subjection to the procedure herein established, cancel any provisional certificate, provided he does not discriminate for reasons of race, sex, color, national origin, ideas, beliefs, or social condition. Any provisional teacher having his certificate canceled, who has evidence of the exercise of such discrimination, may file a petition, within a term of twenty-five (25) days from and after the date of receipt of the notice of the cancellation of the certificate, in the Board of Appeals of the Public Education System, which shall proceed in accordance with the procedure herein established.—June 30, 1965,

No. 115, p. 321, § 12; June 24, 1971, No. 102, p. 340, eff. July 1, 1971.

§ 274l.—Review by Superior Court

The party adversely affected by a decision of the Board may, within the term of thirty (30) days after the petition for reconsideration was denied, appeal therefrom to the San Juan Part of the Superior Court. The review shall be limited to issues of law, and shall be in the light of the original documents, the transcription of the testimony and the documentary evidence. Upon the filing of the petition for review, the Board shall refer to the court the record of the case. The rules for the review of decisions of administrative bodies shall govern the subsequent proceeding before the court. The review shall not stay the effects of the decision of the Board.—June 30, 1965, No. 115, p. 321, § 13, eff. June 30, 1965.

§ 274m.—Objections to transcript of evidence

Objections arising with regard to the transcription of evidence shall be presented before the Board five (5) days after notice shall have been served on the parties with copies thereof.—June 30, 1965, No. 115, p. 321, § 14, eff. June 30, 1965.

§ 274n.—Effect of delay; confirmation and revocation of order

If the proceeding established by sections 274-274o of this title lasts more than ninety (90) days after the date of the cancellation, suspension or severance order, the teacher shall, at the expiration of such period of time, be entitled to continue drawing his salary until the Board shall have made its decision, unless the delay has been due to suspensions at the request of the teacher, or to other causes attributable to him, as determined by the Board. If the order of cancellation or suspension of the certificate or of severance of the teacher were revoked by the Board, the Superior Court of Puerto Rico, or any other

court of appeals, the suspended teacher shall be entitled to recover the salaries he may have failed to receive during the suspension period. If the said order were affirmed and the punishment imposed were the suspension of the certificate the period of time during which the teacher has been suspended from employment and salary shall be accredited to the term of the suspension of the certificate. Moreover, in case the Board or any court revokes the order of cancellation of the teacher's certificate, the latter shall be entitled to refund of the costs and attorney's fees incurred. The said sum, however, may not exceed three hundred (300) dollars in each case. If, on the contrary, the Board or any court finds that the teacher has been obstinate in his appeal, he shall be sentenced to pay the costs of the proceeding.—June 30, 1965, No. 115, p. 321, § 15, eff. June 30, 1965.

§ 274o.—Administration of oaths

The officers or employees of the Department of Education in charge of investigating the conduct of teachers are hereby empowered to administer oaths in the discharge of such functions.—June 30, 1965, No. 115, p. 321, § 16, eff. June 30, 1965.

APPENDIX G

FOOTNOTE 5 OF ORIGINAL SLIP OPINION DELETED BY ORDER OF THE COURT OF APPEALS ON NOVEMBER 18, 1987

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[5] Even if we accepted the dissent's view and characterized Kercado's complaint as a challenge to a pending state dismissal proceeding, abstention would still be inappropriate. The Supreme Court has stated repeatedly that a federal court need not abstain in cases where a state proceeding is motivated by a desire to harass or is conducted in bad faith. *Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. at 429; *Trainor v. Hernandez*, 431 U.S. at 446; *Huffman v. Pursue, Ltd.*, 420 U.S. at 611; *Younger v. Harris*, 401 U.S. at 53-54. The fundament of Kercado's claim is that the dismissal proceeding was brought in bad faith; it was motivated by the Secretary's disaffection for her political affiliation. Thus, if there had been a state proceeding pending here, abstention would still be unwarranted since Kercado's complaint alleged facts sufficient to support the application of the bad faith exception to the *Younger* doctrine.

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 86-1853

IPCIA M. KERCADO-MELENDEZ,
Plaintiff, appellee,

v.

AWILDA APONTE-ROQUE, ETC.,
Defendant, appellant.

Before

BOWNES and BREYER, *Circuit Judges*,
and CAFFREY,* *Senior District Judge*,

ORDER OF COURT

Entered: November 18, 1987

The opinion of the Court of September 22, 1987 is amended by deleting footnote 5 on page 15.

By the Court:

/s/ FRANCIS P. SCIGLIANO
Clerk.

---

* Of the District of Massachusetts, sitting by designation.

[cc: Messrs. Del Valle and Gonzalez Lopez]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1853

IPCIA M. KERCADO-MELENDEZ,
Plaintiff, appellee,

v.

AWILDA APONTE-ROQUE, ETC.,
Defendant, appellant.

Before

CAMPBELL, *Chief Judge*,
COFFIN, BOWNES, BREYER, TORRUELLA and SELYA,
***Circuit Judges*,**
and CAFFREY,* *Senior District Judge*,

ORDER OF COURT

Entered: November 18, 1987

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges for the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

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* Of the District of Massachusetts, sitting by designation.

[cc: Messrs. Del Valle and Gonzalez]

It is ordered that the petition for rehearing and the suggestion for rehearing en banc both be denied.

By the Court:

/s/ FRANCIS P. SCIGLIANO

APPENDIX I

Supreme Court of the United States

No. A-597

AWILDA APONTE ROQUE, ETC.,

Applicant,

v.

IPCIA M. KERCADO-MELENDEZ

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 16, 1988.

/s/ WM. J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 4th
day of February, 1988.

Supreme Court, U.S.
FILED
MAY 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1730

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

AWILDA APONTE ROQUE,
SECRETARY OF THE DEPARTMENT
OF EDUCATION OF THE
COMMONWEALTH OF PUERTO RICO

Petitioner,

v.

IPCIA M. KERCADO-MELENDEZ

Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER BY THE STATES OF KANSAS, NEW HAMPSHIRE, CONNECTICUT AND THE COMMONWEALTH OF PENNSYLVANIA

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IN THE

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OCTOBER TERM, 1987

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AWILDA APONTE ROQUE,
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IPCIA M. KERCADO-MELENDEZ

Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER BY THE STATES OF KANSAS, NEW HAMPSHIRE, CONNECTICUT, AND THE COMMONWEALTH OF PENNSYLVANIA

INTEREST OF THE AMICI CURIAE

The states appearing as *amici curiae*, through their various state executive agencies, are responsible for enforcing the various civil statutes enacted by their respective legislatures for securing the integrity of the state's civil service and public employment. This responsibility is an important one from the standpoint

of protecting the health and welfare of the citizens of the several states.

While this case concerns the enforceability of the Commonwealth of Puerto Rico's statute for the discipline of tenured teachers for just cause, the constitutional principles at stake are of great importance to the proper balance between the states and the federal judiciary. For if the Court of Appeals for the First Circuit's decision is left to stand, it would significantly eviscerate the states' statutory procedure for the discipline for cause of *all* public employees and signal a significant transfer of public service personnel decision from the states' agencies to the federal courts. This result is offensive to the "proper respect for state functions" contemplated by the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), as extended to the state administrative context, and hostile to "the belief that the national government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways." *Id.*, 401 U.S. at 44.

The principles of federalism and comity that this Court has found to be "central" to our form of government have been misapplied by the Court below in a manner inimical to the states' interest in the enforcement of their laws, and thus call for the Court's granting of a writ of certiorari to the Court of Appeals for the First Circuit.

REASONS FOR GRANTING THE WRIT

In *Younger v. Harris*, 401 U.S. 37 (1971), the Court held that, absent special circumstances, reasons of federalism and comity required federal court to ab-

stain from enjoining a pending state criminal prosecution. Subsequently, the Court has expanded the scope of *Younger* to include state civil and administrative proceeding initiated to vindicate an important state interest and which afford the federal plaintiff an opportunity to hear her constitutional claims. *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 106 S.Ct. 2718 (1986); *See Younger v. Harris*, 401 U.S. 37 (1971); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Huffman v. Pursue*, 420 U.S. 592 (1975); *Juidice v. Vail*, 430 U.S. 327 (1977); *Trainor v. Hernández*, 431 U.S. 434 (1977); *Moore v. Sims*, 442 U.S. 413 (1979); *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982); *Pennzoil v. Texaco*, ___ U.S. ___, 107 S.Ct. 1519 (1987).

As petitioners point out, however, a majority of the First Circuit panel mistakenly declined to abstain from interfering with the Commonwealth's disciplinary proceeding initiated pursuant to the Teachers Misconduct Act, P.R. Laws Ann. tit. 18, §§274-274o (1974). By focusing on marginal concerns, the First Circuit permits the defeat of the overriding values of federalism, comity and equity that control whenever the state initiates a proceeding to vindicate an important state interest embodied in state law. If allowed to stand, the First Circuit decision would enable a federal court to transmute itself into a super-personnel board passing judgment on personnel decisions concerning an area traditionally left to the states to perform, such as that of enforcing state statutes concerning the integrity of public service personnel.

In particular, the First Circuit decision errs in the following manner:

I. The First Circuit decision misapplied Supreme Court precedent went it held that abstention is inappropriate merely because the affected teacher alleges that her dismissal was motivated by an unconstitutional purpose

In its decision, the Court of Appeals found that abstention is inappropriate whenever a teacher, instead of attacking the constitutionality of the state proceeding or their underlying statutory predicate, simply "alleges that her dismissal was motivated by an unconstitutional motive." Pet. App. 12a.

The distinction established by Judge Bownes, who penned the majority opinion, for triggering application of *Younger* abstention misconstrues both this Court's precedent and the state interest involved. For this Court has never intimated that the state interest involved in the enforcement of state law diminishes just because the motivation of the state executive is in question. On the contrary, federal intervention is just as intrusive whenever a federal action challenges either the constitutionality of the underlying statute or the constitutionality of the state actor's motive, for in both circumstances the federal action seeks to nullify the enforcement of state law by the state in its sovereign capacity.

The artificial distinction drawn by the majority for applying *Younger* abstention is disingenuous. It would disabled attempts by the state to enforce state law merely by allegations of improper motive, even where there is no indication that the state's administrative-judicial review mechanism cannot fairly adjudicate the employee's claim of unconstitutional motive. While paying lip service to the values of federalism, in essence, the First Circuit's decision reduces abstention

to a rule of pleading. This result is irreconciliable with *Younger* and its progeny.

II. The First Circuit misread *Dayton* when it found the Commonwealth's proceeding to be remedial, rather than coercive, simply because the affected teacher must take "affirmative steps" to invoke the integrated administrative-judicial review mechanism

The First Circuit's decision acknowledges the extension of *Younger* abstention to the state administrative context effectuated by *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, ___ U.S. ___, 106 S.Ct. 2718 (1986). It concluded, nonetheless, that *Dayton* was inapplicable to the state proceeding in question because said proceeding was remedial, rather than coercive. *Dayton*, 106 S.Ct. at 2723, n. 2.

This Court has never spelled out the distinction between a remedial and a coercive state proceeding. This distinction, however, cannot hinge, as Judge Bownes indicates, on whether the affected employee must take affirmative steps to contest the disciplinary charges. For what makes a state proceeding coercive is not whether the affected employee must take affirmative steps to contest the disciplinary charges, but whether the affected employee is unwillingly exposed in a proceeding initiated by the state to the loss of a property or liberty interest for violation of state law. The state disciplinary proceeding is not any less coercive because the charged employee may admit, acquiesce in or otherwise not contest the charges. In such non-contested cases, the affected employee simply acknowledges the charges and accepts the disciplinary sanction against her imposed by the state.

Conversely, should the employee wish to contest the disciplinary charges against her, the "affirmative steps" requirement does not detract from the coercive nature of the proceeding. For in contested cases, the charged employee becomes engaged in an adversarial proceeding in which the state, via the head of the agency, assumes a prosecutorial role with respect to the charged employee. The decision to contest the charges, thus, signals the intent of the affected employee to defend himself and to invoke a full panoply of constitutionally sound administrative-judicial mechanisms to review the merits of the charges and the constitutional defenses, including those of unconstitutional motive, available to the charged employee. It is clear, therefore, that the criteria for determining whether a state proceeding is coercive or remedial cannot merely turn on the availability of an opportunity to contest the underlying charges; it must be grounded on the nature of the proceeding itself, that is, on whether it is a state initiated proceeding of a potentially adversarial nature in which the charged employee is exposed to a disciplinary sanction, including removal, imposed by the state.

III. The First Circuit erred when it refused to apply the exhaustion requirement of *Huffman* to the state administrative proceedings

The First Circuit similarly erred when it refused to apply the exhaustion requirement of *Huffman v. Pursue*, 420 U.S. 592 (1975) to the state proceeding involved. In *Huffman*, the Court held that a "necessary concomittant of *Younger*", is the need to exhaust state appellate remedies before seeking federal injunctive relief. The First Circuit, however, erroneously held that *Patsy v. Florida Board of Regents*,

457 U.S. 592 (1975), dispensed the plaintiffs from compliance with *Huffman*.

As Judge Breyer's dissenting opinion indicates, the panel majority opinion in this respect runs contrary to relevant Supreme Court authority. First of all, *Huffman* indicated that the general no-exhaustion requirement of Section 1983 actions has "nothing to do" with situations in which the state initiated a proceeding to vindicate an important state interest. 420 U.S. at 607-609, n. 21. Furthermore, Justice White's concurring opinion in *Patsy* itself noted that the Court's holding there "is also fully consistent with (the Court's) decisions that a defendant in a civil or administrative enforcement proceeding may not enjoin and sidetrack that proceeding by resorting to a §1983 action in federal court." *Patsy*, 457 U.S. at 518-519 (White, J., concurring). It seems evident, therefore, that *Patsy* does not encompass situations as this one in which the state has initiated a proceeding to vindicate an important state interest and the state proceeding provides for an integrated administrative-judicial review mechanism to contest the validity of the underlying charges and which affords an opportunity to present all constitutional claims. *Patsy* did not concern a state procedure initiated to vindicate values embodied by state law. There, an applicant for employment was allegedly rejected because of her sex and race. The state was not acting in a sovereign capacity as an enforcer of state law. Therefore, none of the values of federalism and comity embodied in the abstention doctrine were at stake. *Patsy* is inapplicable.

As petitioners describe, the First Circuit decision below has focused on secondary considerations to de-

feat the central values of federalism, comity and equity that control whenever a state initiates a proceeding to vindicate important state interest embodied in state law. As a result, the First Circuit decision threatens to deprive the states of functions best left for them to perform, particularly functions associated with the enforcement of state law and the discipline of public employees. Thus, the First Circuit's decision is contrary to Supreme Court authority and is hostile to the proper respect for state functions contemplated by Our Federalism. For these reasons, review by the Court is appropriate.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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